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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

AVIS RENT A CAR SYSTEM, INC., et al.,
Petitioners,

vs.

OSCAR AGUILAR, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

To The Hon. William H. Rehnquist, Chief Justice Of The United States Supreme Court, And The Associate Justices:

Defendants and Petitioners Avis Rent A Car System, Inc. and John Lawrence, respectfully petition for a writ of certiorari to review the opinion and judgment of the California Supreme Court (Ronald M. George, Chief Justice), filed on August 2, 1999.

I. QUESTIONS PRESENTED FOR REVIEW

1. Does the free speech guarantee of the First Amendment to the United States Constitution (as applied to the States by the Fourteenth Amendment) prohibit a California state court from issuing a permanent injunction that restrains the use of a list of words that are deemed by the court to be racially derogatory and offensive, but which do not constitute threats, "fighting words" or other constitutionally proscribable speech?

2. Is the California state court's injunction unconstitutionally vague and overbroad because it enjoins workplace speech that does not constitute harassment in violation of the California Fair Employment and Housing Act?

II. INTERESTED PARTIES

The interested parties to this action are Defendants and Petitioners Avis Rent A Car System, Inc. and John Lawrence. Avis Rent A Car System, Inc. ("Avis") is a Delaware corporation with its principal place of business in New York. Avis is a wholly-owned subsidiary of Avis Rent A Car, Inc., also a Delaware corporation with its principal place of business in New York.

Plaintiffs and Respondents are Oscar Aguilar, Carlos Benavides, Francisco Diaz, Hernan Figueroa, Miguel Fonseca, Ramiro Hernandez, Pablo Icabalceta, Hubert Jimenez, German Lazo, Pedro Mojica, Orlando Peraza, Oswaldo Ramirez, Marcos Recinos, Carlos Reyes, Francisco Rosales, Tomas Rubio, and Mario Serrano.

TABLE OF CONTENTS

Page

I. QUESTIONS PRESENTED i

II. INTERESTED PARTIES ii

TABLE OF CONTENTS iii

LIST OF APPENDICES iv

TABLE OF AUTHORITIES vi

III. JURISDICTIONAL STATEMENT 1

IV. STATEMENT OF THE CASE 1

A. The Underlying Discrimination and Harassment Suit and the Jury's Award 1

B. The California Superior Court's Injunction 2

C. The California Supreme Court's Opinion 4

1. Chief Justice George's Plurality Opinion 4
2. Justice Werdegar's Concurring Opinion 5
3. Justice Mosk's Dissenting Opinion 5
4. Justice Kennard's Dissenting Opinion 7
5. Justice Brown's Dissenting Opinion 8

V. REASONS FOR GRANTING THE WRIT 9

A. The Injunction Violates The First Amendment Because It Is A Content-Based and Viewpoint-Based Prior Restraint of Speech. 9

Page

B. It Is Constitutionally Irrelevant That The Injunction Was Entered After A Finding Of Past Harassment. Punishment For And Suppression Of Speech Are Two Very Different Things. 11

C. The Injunction Is A Prior Restraint of Constitutionally Protected Speech. 15

VI. CONCLUSION 18

LIST OF APPENDICES

APPENDIX A
Opinion, In the Supreme Court of California, Filed August 2, 1999 ..... A 1

APPENDIX B
Opinion, In the Court of Appeal of the State of California, First Appellate District, Division Five, Filed May 21, 1996 ..... B 1

APPENDIX C
Permanent Injunction, In the Superior Court of the State of California, for the County of San Francisco, Filed February 14, 1995 ..... C 1

APPENDIX D
Amended Judgment, In the Superior Court for the State of California, for the County of San Francisco, Filed February 28, 1995 ..... D 1

Page

APPENDIX E
Notice of Motion and Motion of Appellants Avis Rent a Car System, Inc. And John Lawrence to Augment the Record on Appeal, In the Supreme Court of the State of California, Received March 26, 1997 ..... E 1

APPENDIX F
Constitution of the United States of America, Amendment 1 ..... F 1

California Government Code § 12940, Unlawful Employment Practice ..... F 2

APPENDIX G
Defendants' Opposition to Plaintiffs' Application for Injunctive Relief, In the Superior Court of the State of California, for the County of San Francisco, Filed December 12, 1994 ..... G 1

TABLE OF AUTHORITIES

Page

Cases

Bantam Books, Inc. v. Sullivan
372 U.S. 58, 70 (1968) 12

Boos v. Barry
485 U.S. 312, 320 (1988) 16

Collin v. Smith
578 F.2d 1197, 1207 (7th Cir. 1978), *cert. denied*,
439 U.S. 916 (1978) 18

DeAngelis v. El Paso Mun. Police Officers Ass'n
51 F.3d 591, 596-597, and n.7 (5th Cir. 1995),
cert. denied. 516 U.S. 974 (1995) 17

Doe v. University of Michigan
721 F. Supp. 852, 863 (E.D. Mich. 1989) 18

Garrison v. Burke
165 F.3d 565, 570 (7th Cir. 1999) 13

Gipson v. KAS Snacktime Co.
171 F.3d 574, 580 (8th Cir. 1999) 14

Harris v. Forklift Systems, Inc.
510 U.S. 17 (1993) 8, 13, 14, 17

Hustler Magazine v. Falwell
485 U.S. 46 (1988) 11

Page

Konstantopoulos v. Westavco Corp.
112 F.3d 710, 716, 719-21 (3d Cir. 1997) 13

Madsen v. Women's Health Center
512 U.S. 753 at 765 (1994) 4, 5

Meritor Savings Bank v. Vinson
477 U.S. 57 (1986) 8

NAACP v. Button
371 U.S. 415 (1963) 14

Near v. Minnesota
283 U.S. 697 (1931) 11, 12

Nebraska Press Assn. v. Stuart
427 U.S. 539, 589 (1976) 12

New York Times v. United States
403 U.S. 713 (1971) 11

NLRB v. Gissel Packing Co.
395 U.S. 575 (1969) 5

Oncale v. Sundowner Offshore Services, Inc.
523 U.S. 75, 78 (1998) 13

Organization for a Better Austin v. Keefe
402 U.S. 415, 419 (1971) 13

Perry Ed. Assn. v. Perry Local Educators' Assn.
460 U.S. 37, 45 (1983) 5

Pittsburgh Press Co. v. Human Relations Comm.
413 U.S. 376 (1973) 12

Page

R.A.V. v. St. Paul
505 U.S. 377, 382 (1992). 8, 9, 15, 16, 17

Rosenberger v. Rector and Visitors of Univ. of Va.
515 U.S. 819, 828, 829 (1995) 10

Rowan v. Post Office Dept.
397 U.S. 728 (1970) 5

Southeastern Promotions, Ltd. v. Conrad
420 U.S. 546, 559 (1975) 12

Texas v. *Johnson*
491 U.S. 397, 414 (1989) 9

United States v. W.T. Grant,
345 U.S. 629 (1953)] 1

Webb v. Missouri Pacific Railroad Co.
98 F.3d 1067 (8th Cir. 1996) 14

Witt v. Roadway Express
136 F.3d 1424 (10th Cir. 1996) 14

Statutes

28 U.S.C. § 1257(a) 1

California Fair Employment & Housing Act, Govt. Code
§ 12940 *et seq* 1

Page

Publications

Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*
52 Ohio St. L.J. 481, 522 (1991) 10, 18

Fowles, *Hostile Environment and The First Amendment: What Now After Harris And St. Paul?*
46 S.C. L. Rev. 471, 471-473 (1995) 18

Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment - Avoiding A Collision*
37 Vill. L. Rev. 757 (1992) 18

Volokh, *Freedom of Speech and Workplace Harassment*
39 U.C.L.A. L. Rev. 1791, 1814-1818,
1820 n.130, 1827 n.169 (1992) 18

III. JURISDICTIONAL STATEMENT

This Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1257(a). Petitioners seek review from a final judgment of the California Supreme Court, entered August 2, 1999, which rejected Petitioners' challenge to an injunction that restrains protected speech in violation of the First Amendment to the United States Constitution.[1]

IV. STATEMENT OF THE CASE

A. The Underlying Discrimination and Harassment Suit and the Jury's Award

Respondents are seventeen Latinos who worked for Avis Rent A Car System, Inc. as drivers at the San Francisco airport facility, moving rental cars between parking lots and check-in and service areas. In April 1993, Respondents filed a First Amended Complaint in state court in San Francisco against Avis and other individual managers and employees, including John Lawrence (who is not a manager), alleging discrimination and harassment in violation of the California Fair Employment & Housing Act, Govt. Code § 12940 *et seq*.

The claims of twelve Respondents went to the jury in the Fall of 1994. On October 21, 1994, the jury returned special verdicts substantially rejecting Respondents' case. The jury found that three Respondents (Oscar Aguilar, Hernan Figueroa, and Pablo Icabalceta) were never harassed or discriminated against by anyone. None of the Respondents proved any harassment or discrimination by Avis managers Kathie Klopfer or Mary Gallagher. Of the four Respon-

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[1] The text of the First Amendment and the California Fair Employment & Housing Act, Cal. Gov't Code § 12940 *et seq*., are set out in the Appendix filed concurrently herewith.

dents who claimed discriminatory and/or retaliatory discharge, all claims were decided in favor of Avis either by non-suit, directed verdict or jury verdict.

Relevant to this Petition, the jury found only that Lawrence harassed three Respondents (Pedro Mojica, Orlando Peraza and Marcos Recinos). Respondents offered no evidence that Lawrence (or anyone else) had harassed them for at least two years preceding the trial. Pedro Mojica (the only Avis employee who obtained an award against Lawrence and who still worked for Avis at the time of the injunction hearing) testified at trial in 1994 that he had worked only one day a week with Lawrence since 1991. He admitted that Lawrence was not harassing him at the time of the trial.[2]

B. The California Superior Court's Injunction

On November 18, 1994, the California Superior Court invited Respondents to make a request for injunctive relief. At the hearing held on December 15, 1994, Petitioners opposed Respondents' request for an injunction and argued that Respondents had not shown any immediate risk of substantial harm that would support a prior restraint of speech. Petitioners voiced their constitutional objections at the December 15, 1994 hearing:

> We would dispute that it is [Petitioners'] burden . . . . With respect to every California case we have found, and indeed with respect to the U.S. Supreme Court's decision in *[United States v. W.T.] Grant*, [345 U.S. 629 (1953)], the burden is on the moving party to

[2] See Defendants' Opposition to Plaintiffs' Application for Injunctive Relief, filed December 12, 1994 and Ex. A thereto (contained in Petitioners' Appendix). Petitioners maintained at trial that Lawrence did not utter racially offensive words in the workplace and that Petitioners did not harass or discriminate against any of the Respondents. Petitioners oppose the injunction not because they seek license to use hurtful words in the workplace. Petitioners seek no such thing. Petitioners request review because it is unacceptable in a free society for a court to draft a list of words that can never be spoken, regardless of their context or the effect on the listener, based on the court's personal policy views that such words are offensive.

> show that there is some immediate risk of harm unless something is done. . . .
>
> * * *
>
> "The cases talk in terms of immediate need for injunctive relief, an immediate risk of harm. I would submit that this is a higher burden than simply sitting here and speculating [about] what might happen based on events [that occurred] two, three years ago." [Reporter's Transcript of December 15, 1994 Hearing on Post-Trial Motions, at pp. 083- 084].

On February 14, 1995, over Petitioners' objection, the state court issued a judgment including a permanent injunction. The injunction directed Lawrence to "cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees" of Avis, and to "further refrain from any uninvited intentional touching of said Hispanic/Latino employees." By its terms, the injunction remains in effect as long as Lawrence is employed by Avis in California. It is not restricted to the workplace or to work time.

The injunction also directs Avis to "cease and desist from allowing defendant John Lawrence to commit any of the acts" described above, "under circumstances in which [Avis] knew or should have known of such acts." Avis is further enjoined "not to investigate or permit investigations regarding breaches of its rules or practices when such investigations are limited to subjects or targets who are Hispanic/Latino employees of said defendant, unless the circumstances are such that no employees other than Hispanic/Latinos are reasonably subjects or targets of such investigations." On February 28, 1995, the trial court issued an amended judgment that corrected an error in the judgment unrelated to the injunction.

On March 14, 1995, Avis and Lawrence filed an appeal limited to the injunctive portion of the judgment. Petitioners argued that the injunction violated their free speech rights under the federal and California Constitutions. The California Court of Appeal found the

injunction overbroad insofar as it restricted Lawrence's activities outside the workplace, and found the injunction vague in its prohibition against "derogatory racial or ethnic epithets." To cure these defects, the Court of Appeal reversed to permit the state trial court to redraft the injunction to limit its scope to the workplace and to add an "exemplary list of prohibited derogatory racial or ethnic epithets, specifying epithets such as those actually used in the workplace by Lawrence." Except as so stated, the Court of Appeal rejected Petitioner's free speech arguments and upheld the injunction.

C. The California Supreme Court's Opinion

1. Chief Justice George's Plurality Opinion

In a decision marked by five separate opinions, Chief Justice Ronald M. George, writing for a plurality of the Court, affirmed the judgment of the Court of Appeal. The Chief Justice held that because a jury had found at trial that Lawrence's speech years earlier had created a hostile work environment, an injunction prohibiting Lawrence's continued use of derogatory racial speech does not violate the freedom of speech. *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal.4th at 141-42, 87 Cal.Rptr.2nd at 132 (1999). The plurality rejected Petitioners' contention that the injunction is an unconstitutional prior restraint. According to the Supreme Court plurality, the injunction is not a restraint at all because the speech had been found to constitute employment discrimination. 21 Cal.4th at 138, 87 Cal.Rptr.2nd at 146. Thus, the plurality ruled injunction did not restrain speech at all but only "conduct" (i.e., employment discrimination), even though the "conduct" subject to the prior restraint consists entirely of Lawrence's speech.

The plurality also rejected Petitioners' challenge that Respondents had failed to show any need for the injunction since Lawrence had not harassed anyone for at least two years before the trial and, therefore, that the injunction was unconstitutionally overbroad. Without addressing the requirement "that injunctive relief [on constitutionally protected speech] should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs[,]" *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), the plurality stated that "[t]he mere fact that a defendant refrains from unlawful conduct during the pendency of a lawsuit does not necessarily preclude the trial court from issuing injunctive relief to prevent a post-trial continuation of the unlawful conduct." 21 Cal.4th at 133, 87 Cal.Rptr.2nd at 140.

2. Justice Werdegar's Concurring Opinion

In a separate concurring opinion, Justice Kathleen Werdegar conceded that none of this Court's existing free speech doctrines standing alone permits the injunction. 21 Cal.4th at 148, 87 Cal.Rptr.2nd at 154 (Werdegar, J. concurring). Nonetheless, Justice Werdegar created an exception to the prohibition against prior restraints based on what she called "strands of analysis" taken from this Court's cases about free speech and employment discrimination. *Id.*

Justice Werdegar based her decision on cases concerning an employer's threatening conduct in the course of a union organizing campaign [*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)]; "captive audiences" [*Rowan v. Post Office Dept.*, 397 U.S. 728 (1970)]; and "time, place and manner" restrictions [*Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). None of these cases is on point. Respondents never argued that Petitioners had engaged in threatening conduct. Nor is the injunction a valid "time, place and manner restriction." Such restrictions are permissible only if they are content-neutral and carefully tailored to leave open other channels of communication. The state court's injunction is both content and viewpoint based and, is not narrowly tailored. It prohibits any future use of certain words in the workplace.

3. Justice Mosk's Dissenting Opinion

Justices Stanley Mosk, Joyce Kennard and Janice Brown each wrote separate dissenting opinions, concluding that the injunction is an unconstitutional prior restraint, void in its entirety and not subject to remand.

Justice Stanley Mosk flatly rejected the plurality's contention that the injunction is not a prior restraint because it was issued after a jury found that Petitioners had previously engaged in racial harassment.

> "The term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.' . . . 'Temporary restraining orders and permanent injunctions —*i.e.*, court orders that actually forbid speech activities— are classic examples of prior restraints.' . . . The injunction here falls squarely within that definition. It was not transformed into something acceptable simply because it was issued after a judicial finding of past employment discrimination." 21 Cal. 4th at 171, 87 Cal.Rptr.2nd at 168 [Mosk, J., dissenting; citations omitted].

Justice Mosk stated that the injunction was overbroad because Respondents had not shown any "real and immediate threat of future injury" since Lawrence had not allegedly harassed anyone for two years. 21 Cal.4th at 172 n. 1, 87 Cal.Rptr.2nd at 169 (Mosk, J., dissenting). He also stated that the injunction was unconstitutionally overbroad because it targeted speech that does not even violate the law:

> "I disagree that any future use even of slurs, vulgarity, or derogatory epithets in the workplace — even by a person who has previously engaged in employment discrimination — can constitutionally be proscribed. That is because the offensive content and effect of using any one, or more, of a list of verboten words cannot be determined in advance: 'The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. Thus, the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech

> occurs, but also on exactly what the speaker had to say. Similarly, it is the content of the utterance that determines whether it is a protected epithet or an unprotected "fighting comment."' . . . For this reason, I would hold that the injunction fails to overcome the heavy presumption against the constitutional validity of prior restraints on speech." 21 Cal.4th at 173, 87 Cal.Rptr.2nd at 170 (emphasis added; citations omitted).

4. Justice Kennard's Dissenting Opinion

Justice Kennard ruled that the injunction was both content and viewpoint based and permissible only to the extent it was necessary to serve a compelling governmental interest and narrowly drawn to achieve that end. Respondents failed to show that the injunction was necessary or that it was narrowly tailored. First, Respondents failed to show that the award of damages would not provide a sufficient deterrent effect. 21 Cal.4th at 180, 87 Cal.Rptr.2nd at 175 (Kennard, J., dissenting). The injunction was not narrowly drawn because it prohibited Lawrence from addressing derogatory racial speech not only to the Respondents (only one of whom worked with Avis at the time of the oral argument before the state Supreme Court), but also to strangers to the proceeding.

In addition, the injunction prohibited Lawrence not only from directing racial speech to Hispanic employees but also from using such speech to describe these employees. This portion of the injunction applies whether or not any Avis employee ever heard or learned about the speech, and prohibited *every* utterance of a racial or ethnic remark, not just those that actually produced a hostile working environment. Thus, the injunction violated Lawrence's free speech rights because it was not narrowly drawn to serve the governmental interest in eliminating employment discrimination:

> "Because isolated remarks seldom, if ever, cause a hostile work environment, and because determining the existence of a hostile work environment requires an examination of all relevant circumstances, it is

> impossible to demonstrate in advance that any particular workplace speech will create a hostile work environment (and thus potentialiy be subject to regulation without violating the First Amendment), much less that it will produce direct, immediate, and irreparable injury. Accordingly, the conclusion seems inescapable that injunctions prohibiting any future offensive workplace speech on the basis of content and viewpoint are invariably and necessarily unconstitutional prior restraints on speech." 21 Cal.4th at 183, 87 Cal.Rptr.2nd at 177.

Justice Kennard also was unpersuaded by the plurality's assertion that the injunction was valid because it was entered after a jury trial:

> "An employer who has engaged in or permitted discriminatory verbal harassment that produced a hostile work environment, as determined by a jury following a full and fair trial, may not thereafter be enjoined from engaging in or permitting similar offensive speech on the theory that it *might* again produce a hostile work environment. Any injunction that restricts speech on the basis of viewpoint, even one issued to remedy past discrimination and to prevent its recurrence, must narrowly target the evil of employment discrimination and not prohibit more speech than necessary." 21 Cal.4th at 187-88, 87 Cal.Rptr.2nd at 180.

5. Justice Brown's Dissenting Opinion

Justice Janice Brown responded to the plurality's attempt to find support for its ruling in this Court's decisions in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), and *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). As she noted, *Harris* and *Meritor* "did not even discuss the First Amendment, let alone apply it." 21 Cal.4th at 191 (Brown, J., dissenting). Justice Brown also rejected the plurality's reliance on *R.A.V. v. St. Paul, supra,* 505 U.S. 377, a case

which she notes "had nothing to do with Title VII or workplace discrimination." If anything, *R.A.V.* suggests that a content-based regulation of speech is invalid to the extent it regulates "fully protected speech" like the speech at issue here. *Id.* at 191, 87 Cal.Rptr.2nd at 185.

Justice Brown also disagreed with the plurality's assertion that speech that violates employment discrimination laws is *a fortiori* constitutionally unprotected:

> "That standard turns the world on its head. In effect, the plurality says, 'The Legislature, acting in response to current popular sentiments, has carved out certain ideas from the universe of ideas and declared them to be bad ideas, and once an idea has been judicially determined to be one of these bad ideas, courts can prohibit anyone from expressing it.' I disagree." *Id.* at 193.

V. REASONS FOR GRANTING THE WRIT

A. The Injunction Violates The First Amendment Because It Is A Content-Based and Viewpoint-Based Prior Restraint of Speech.

Petitioners Avis Rent A Car System, Inc. and John Lawrence seek review of a decision of the California Supreme Court, astounding both in its reasoning and scope, which creates a new exception to the First Amendment's prohibition against prior restraints because racially derogatory speech in the workplace may happen to offend someone.

The California Supreme Court's ruling is without support in this Court's precedents and wrongheaded in its abandonment of one of our Nation's most cherished values as a free society. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). As eloquently stated by Justice Janice Brown in her dissenting opinion in *Aguilar*, "One of

the truths we hold to be self-evident is that a government that tells its citizens what they may *say* will soon be dictating what they may *think*. But in a country that puts such a high premium on freedom, we cannot allow ourselves to be the captives of orthodox, culturally imposed thinking patterns. Indeed, I can conceive no imprisonment so complete, no subjugation so absolute, no debasement so abject as the enslavement of the mind." 21 Cal.4th at 196, 87 Cal. Rptr. 2d 132 (Brown, J., dissenting).

The plurality opinion in *Aguilar* obliterates fundamental free speech guarantees, concluding that racially offensive speech is constitutionally unprotected and can be banned in advance in the workplace without regard to what is said, to whom, and in what context. The plurality directs the state trial court to compile a list of "bad" words that will be forbidden anywhere in the workplace, forever. On its face, the injunction is a content-based and viewpoint based restriction, aimed at sparing the audience the emotive harm caused by the speech and is presumptively invalid. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828, 829 (1995); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

Notably, the injunction does not seek to eliminate all speech that harms an employee's work environment, but only that speech that does so based on selected classifications. The order does not, for example, prohibit Lawrence from using non-racial obscenities in the workplace, even though they could likewise create a "hostile work environment." As Professor Kingsley Browne notes, "[A]n employee's work performance may be seriously affected by his coworkers' telling him daily that he is the illegitimate offspring of a diseased prostitute, but he is entitled to no protection. An employee may be similarly offended by continual expressions of feminist viewpoints in the workplace. Such employees, however, are without recourse under Title VII." Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 Ohio St. L.J. 481, 522 (1991). Accordingly, the injunction is *not* content or viewpoint neutral, and cannot be upheld as a reasonable time, place, and manner restriction of Lawrence's speech.

B. It Is Constitutionally Irrelevant That The Injunction Was Entered After A Finding Of Past Harassment. Punishment For And Suppression Of Speech Are Two Very Different Things.

The plurality opinion asserts that the injunction is not a prior restraint. It plainly is. According to the Chief Justice, "'speech may be enjoined where a fair judicial process has determined that a repetitive pattern of speech is unprotected.'" 21 Cal.4th at 142. But the prior restraint doctrine *assumes* that the speech is constitutionally unprotected. Indeed, the rule forbidding prior restraints only makes sense on this assumption. If speech is constitutionally protected, courts have no business restraining it in advance. The prior restraint rule functions only when the speech is unprotected or assumed to be unprotected. Even where the speech is alleged to be treasonous, hurtful or defamatory, this Court has not tolerated attempts to muzzle the speech in advance. See *Near v. Minnesota*, 283 U.S. 697 (1931) (defamation — an unprotected category of speech that can be the subject of a lawsuit — nevertheless cannot be enjoined); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (outrageous sexual parody of religious leader in national pornographic magazine cannot be enjoined); *New York Times v. United States*, 403 U.S. 713 (1971) (disclosure of documents damaging to national security interests generally cannot be enjoined). Under this Court's precedents, if speech produces special harms it may be punished after the fact. *But the utterance of the words themselves is protected and cannot be restrained.* As California Supreme Court Justice Stanley Mosk stated in his dissenting opinion in *Aguilar*, "[p]unishment for and suppression of speech are two very different things. . . ." 21 Cal.4th at 174, 87 Cal.Rptr.2nd at 171 (Mosk, J., dissenting). The relevant inquiry is not whether the jury had sufficient evidence upon which to award damages for emotional distress, but whether a court can enjoin otherwise constitutionally protected speech in perpetuity because some may find it objectionable.

The plurality's conclusion that the injunction survives constitutional scrutiny because it was entered after a trial is completely inconsistent with *Near v. Minnesota, supra*, 283 U.S.

697. *Near* invalidated an injunction against publishing "malicious, scandalous and defamatory" falsehoods even though it had been determined at trial, after a full evidentiary hearing, that the defendant had published nine newspaper articles filled with anti-Semitic invective. This Court assumed the speech was constitutionally unprotected but still struck down the injunction. As this Court stated, "Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." *Near*, 283 U.S. at 720.

The plurality's reliance on *Pittsburgh Press Co. v. Human Relations Comm.*, 413 U.S. 376 (1973), also is misplaced. In *Pittsburgh Press*, this Court upheld an injunction prohibiting a newspaper from limiting its "help wanted" ads by gender specific categories. Because the injunction's prohibition extended only to commercial speech already determined to be constitutionally unprotected, and because this determination did not turn on the effect of the ads on particular jobseekers, this Court emphasized that the order "[did] not endanger arguably protected speech" and did not require the court "to speculate as to the effect of the publication" in the future." 413 U.S. at 390.

In contrast, the language at issue here is not commercial speech, and the determination of racial harassment turns on the subjective emotional impact of the speech on the listener. No one can predict what effect future speech will have. "It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). For this reason, the First Amendment "accords greater protection against prior restraints than it does against subsequent punishment for a particular speech." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 589 (1976) (conc. opn. of Brennan, J.). A prior restraint is subject to a "heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1968). Those seeking to defend a prior restraint "carr[y] a heavy burden of showing

justification for the imposition of such a restraint." *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).

The state court's injunction fails under this rigorous standard. The prohibited words are not defamatory, do not constitute threats of imminent violence or "fighting words" and would not even violate the law. As explained by this Court in *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75, 78 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), a finding of hostile environment harassment turns on an evaluation of a myriad of circumstances, including the effect of particular speech on the listener. " '[M]ere utterance of an . . . epithet which engenders offensive feelings in an employee [citation] does not sufficiently affect the conditions of employment to implicate Title VII.' " The plurality opinion pays lipservice to this requirement, reasoning that once a hostile environment is created it can be brought back at any time by a single racially derogatory remark, even one uttered outside the hearing of the Respondents. *See Aguilar*, 27 Cal.4th at 146; 87 Cal.Rptr.2nd at 150 ("It is certainly possible that the use of racial remarks even outside the hearing of plaintiffs would contribute to an atmosphere of racial hostility that would perpetuate the hostile environment created by defendants.") The plurality's analysis does not support a prior restraint, since the injunction extends to speech that does not violate the law.

First, the record is undisputed that the hostile environment alleged in this case was created no later than 1992 and no longer exists. Respondents offered no evidence that Petitioners had harassed them for at least two years before the trial. A hostile environment dissipates over time. *E.g., Konstantopoulos v. Westavco Corp.*, 112 F.3d 710, 716, 719-21 (3d Cir. 1997) (seven month gap between harassing incidents allowed "effects of prior incidents to dissipate," meaning that new harassing acts did not revive previously existing hostile environment); even month gap between harassing incidents allowed "effects of prior incidents to dissipate," meaning that new harassing acts did not revive previously existing hostile environment); *Garrison v. Burke*, 165 F.3d 565, 570 (7th Cir. 1999) (2 year respite from harassment precludes continuing

violation, despite earlier occurrence of very severe harassment); *Gipson v. KAS Snacktime Co.*, 171 F.3d 574, 580 (8th Cir. 1999) (21 months in which there was no contact between the harasser and the victim dissipated hostile environment). *Cf. Webb v. Missouri Pacific Railroad* Co., 98 F.3d 1067 (8th Cir. 1996) (injunction entered three years after trial record had been closed was based on stale evidence and should not have been granted); *Witt v. Roadway Express,* 136 F.3d 1424 (10th Cir. 1996) (2 uses of the word "nigger" by supervisors did not create hostile work environment, even though additional epithets were used outside the statute of limitations period).

Second, not only will a single use of a forbidden word by Lawrence not create a hostile environment, it is utterly speculative to suggest that it will even contribute to the potential development of a hostile environment. As the dissenting opinions in *Aguilar* note, the (one remaining) Respondent may not even know if Lawrence uses the word outside his presence, and even if he does learn about the use of the word, he may not be offended by it. *Compare Aguilar*, 27 Cal.4th at 170, 87 Cal. Rptr. 2d at 169 (Mosk, J., dissenting) (The injunction "forbid[s] *any* future use of a list of offensive words in the workplace -- even outside the presence of plaintiffs and even if welcome or overly permitted") *with id.* at 851 , 87 Cal.Rptr.2nd at 138 (plurality opinion) (conceding that "'if the victim does not subjectively perceive the environment to be abusive . . . there is no [harassment] violation'"), *quoting Harris v. Forklift System*, Inc., 510 U.S. 17, 21-22 (1993).

The injunction ignores this necessary analysis and prohibits each instance of protected speech even if it is welcome and even if no one ever hears or learns about it illustrating that the injunction is not narrowly tailored, even under the loose-fitting standard applicable to content-neutral speech restrictions. *See, e.g., NAACP v. Button*, 371 U.S. 415 (1963) ["Broad prophylactic rules in the area of free expression are suspect . . . Precision of regulation must be the touchstone in an area so closely touching on our most precious freedoms."]. The *Aguilar* injunction — which prohibits specified words — is obviously content-based and viewpoint-based, and any

injunction against speech because of its content or point of view is an unconstitutional prior restraint. As Justice Stanley Mosk stated in his dissenting opinion in *Aguilar*, "the injunction at issue constitutes a broad prohibition touching on *core protected speech*. It applies to words that, although offensive, may be used to convey ideas or emotions and are therefore shielded by the First Amendment." [21 Cal.4th at 172-73, 87 Cal.Rptr.2nd at 170, Mosk, J., dissenting; emphasis in original].

C. The Injunction Is A Prior Restraint of Constitutionally Protected Speech.

The plurality decision also conflicts with R*.A.V. v. St. Paul,* 505 U.S. 377 (1992), which held that, even when speech falls within a category of proscribable speech — which the language at issue here is not — the government cannot regulate the speech in a content-based way. (*R.A.V., supra*, 505 U.S. at pp. 383-384). In *R.A.V.*, this Court considered a St. Paul, Minnesota, ordinance that proscribed a certain class of "fighting words" deemed particularly offensive by the city—those that contained a message of bias-motivated hatred. Writing for the majority, Justice Scalia struck down the law as a content-based restraint of speech. The Court ruled that the state could prohibit "fighting words," so long as the ban was unrelated to the message contained in the expression. 505 U.S. at 380. In other words, a state could enjoin all words that cause offense, but it cannot constitutionally ban only certain categories of "fighting words" because it believes certain language to be particularly offensive. "The government may not regulate use based on the hostility—or favoritism—towards the underlying message expressed." 505 U.S. at 386.

The Court in *R.A.V.* discussed two traditional exceptions to its proscription against content-based restraints on speech. First, there is no First Amendment violation "when the basis for content discrimination consists of the very reason the entire class of speech is proscribable." *Id.* at 388. Second, Justice Scalia stated that even a content-based regulation of a subclass of speech may be permitted where the regulation is justified ***without reference to the content of the speech***. "A State could, for example, permit all live obscene

performances except those involving minors." *Id.* at 389. In this example, the regulation is not concerned with the possible harmful effects on the viewers of the obscene performance, but its deleterious effect on minors who would perform in the shows. Put another way, "[s]o long as the justifications for the regulation *have nothing to do with content, i.e.*, the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters ... the regulation was properly analyzed as content neutral." *Boos v. Barry*, 485 U.S. 312, 320 (1988) (emphasis added).

Against this background, the city of St. Paul attempted to justify the cross burning ordinance under *Renton's* "secondary effects" exception. The city argued that the ordinance was intended to "protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that has historically been discriminated against." *Id.* at 394. Writing for the Supreme Court majority, Justice Scalia categorically rejected this argument and struck down the ordinance.

> "Even assuming that an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed to only the secondary effects of such speech, it is clear that the St. Paul ordinance is not directed to secondary effects within the meaning of *Renton*. As we said in *Boos v. Barry*, 485 U.S. 312 (1988), 'Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton'*. ***The emotive impact of speech is not a secondary effect.***"

Id. (emphasis added).

In upholding the injunction against non-fighting words, the plurality and concurring opinions turn Justice Scalia's reasoning about the traditional limits of constitutional free speech protection upside down, and conclude that *R.A.V. —which struck down an injunction against racially discriminatory fighting words that caused severe harm to its victims*—actually *supports* the issuance of an injunction against nonfighting words in this case because they may contribute to the continuation of a hostile work environment. To

borrow a phrase from Justice Scalia," [t]his is word play." *R.A.V.*, 505 U.S. at 392.

The only reason why racially derogatory speech creates a hostile environment is because it expresses a particularly offensive message. Indeed, there can be no actionable claim of harassment unless the speech has such an emotive impact. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). The victim must actually hear the speech; if he is unaware of it, then it cannot alter his work environment. "[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Harris*, *id.* at 21 - 22.

As noted in *R.A.V.*, "[w]hat makes the anger, fear, sense of dishonor, etc. produced by the violation of the [St. Paul hate crime] ordinance distinct from the anger, fear, sense of dishonor, etc. produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded so easily." 505 U.S. at 392-93. The harm occurs upon hearing the message, and it is this harm to the listener that the injunction seeks to eliminate. However, the listener's subjective reaction to racist speech is no more a justification for injunctive relief in this case than it was in *R.A.V.*

Consistent with the above reasoning, numerous courts and constitutional scholars reject the plurality's analysis and agree that a desire to suppress offensive speech in the workplace simply because it may contribute to a hostile environment is unconstitutional. *See DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-597, and n.7 (5th Cir. 1995), *cert. denied.* 516 U.S. 974 (1995) ["The United States Supreme] Court's pronouncement in *R.A.V.*, that 'sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general proscription against sexual discrimination in employment does not mean that Title VII trumps First Amendment speech rights. . . ." Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment

claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content based, viewpoint-discriminatory restrictions on speech."].

See also, Doe v. University of Michigan, 721 F. Supp. 852, 863 (E.D. Mich. 1989) [ruling unconstitutional a campus offensive speech policy, under which the university found a graduate student guilty of sexual harassment because he stated in a research class that he believed homosexuality was unnatural and that a counseling program "would remedy the problem"]; *Collin v. Smith*, 578 F.2d 1197, 1207 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) [court struck down a law that would have denied neo-Nazis the right to express their racist and anti-Semitic views in a march through Skokie, Illinois, a primarily Jewish suburb of Chicago]; Browne, *supra*, 52 Ohio St. L.J. at 550 n.180; Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment - Avoiding A Collision*, 37 Vill. L. Rev. 757 (1992); Volokh, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L. Rev. 1791, 1814-1818, 1820 n.130, 1827 n.169 (1992); Fowles, *Hostile Environment and The First Amendment: What Now After Harris And St. Paul?*, 46 S.C. L. Rev. 471, 471-473 (1995).

VI. CONCLUSION

Petitioners do not condone racial discrimination in the workplace. However, the issue here is speech, not discrimination, since the injunction extends to the use of words that does not violate the law.

Time has long taught us the fallacy of the children's rhyme, for words can sometimes be hurtful. In attempting to weigh competing policy interests, the Supreme Court struck the balance against free speech. But our Constitution has already balanced the scales. The First Amendment forbids a court from using its pen to censor speech, even where speaker's words may be obnoxious and offensive. For all of these reasons, Petitioners Avis Rent A Car System, Inc. and John Lawrence urge that this Court grant their Petition and review

the California Supreme Court's decision in *Aguilar v. Avis Rent A Car System, Inc.*

Dated: October 29, 1999 Respectfully submitted,

MARTIN KRESSE
Counsel of Record
for Defendants and Petitioners
AVIS RENT A CAR SYSTEM,
INC. and JOHN LAWRENCE

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

OSCAR AGUILAR et al.,	)	**FILED**
Plaintiffs and Respondents,	)	8/2/99
v.	)	Ct.App. A069353
AVIS RENT A CAR	)	San Francisco County
SYSTEM, INC., et al.,	)	Super.Ct.No. 948597
Defendants and Appellants.	)	

A jury found that defendants had engaged in employment discrimination, in part by permitting plaintiffs to be the target of racial epithets repeatedly spoken by a fellow employee. In addition to awarding damages, the trial court issued an injunction prohibiting the offending employee from using such epithets in the future. Defendants argue that such an injunction constitutes a prior restraint that violates their constitutional right to freedom of speech. For the reasons that follow, we hold that a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination.

I

The present appeal is from a judgment awarding damages and injunctive relief. Defendants have not provided a reporter's transcript of the trial proceedings, and have elected to proceed by means of an appendix in lieu of a clerk's transcript. We glean the following from this rather limited record.

In a first amended complaint dated April 26, 1993, 17 Latino employees of Avis Rent A Car System, Inc., sued Avis and 10 named individuals, alleging causes of action for employment discrimination in violation of the Fair Employment and Housing Act (FEHA) (Gov.

Code, § 12900 et seq.),[1] wrongful discharge in violation of public policy, intentional infliction of emotional distress, and negligent infliction of emotional distress.

The complaint alleged that plaintiffs were employed by Avis as "drivers," at its San Francisco Airport facility, to move Avis vehicles among parking lots and from one airport location to another. Defendant John Lawrence was "the service station manager at the SFO AVIS location and was authorized to direct and control the drivers." The complaint alleged that Lawrence "verbally harassed [plaintiffs] constantly. He routinely called *only* the Latino drivers 'motherfuckers' and other derogatory names, and continually demeaned them on the basis of their race, national origin and lack of English language skills." (Italics in original.) Defendant Kathy Black was alleged to have conducted a discriminatory investigation into the suspected theft of a calculator from a rental vehicle, detaining and questioning only Latino employees. In the course of this inquiry, a police officer was summoned and plaintiffs were told that the Immigration and Naturalization Service would be called if they did not cooperate. The calculator was found the following day, and Black apologized to plaintiffs.

On October 27, 1994, the jury returned special verdicts, finding as follows: Plaintiffs Ramiro Hernandez, German Lazo, Oswaldo Ramirez, Carlos Reyes, and Mario Serrano were harassed or discriminated against by a supervisor, Black. Each of these plaintiffs was awarded damages in the amount of $15,000. Plaintiffs Pedro Mojica and Orlando Peraza were harassed or discriminated against by Black and Lawrence. Avis knew or should have known of Lawrence's conduct with respect to these employees and took no action. Mojica and Peraza each were awarded damages in the amount of $25,000. Plaintiff Marcos Recinos was harassed or discriminated against by Black and Lawrence, but Avis did not know, nor should it have known, about Lawrence's conduct with respect to him. Recinos was awarded damages in the amount $25,000. Plaintiff Miguel Fonseca was harassed or discriminated against by Lawrence. Avis knew or should have known of Lawrence's conduct

[1] All further statutory references are to the Government Code, unless otherwise specified.

with respect to Fonseca and took no action, but Fonseca did not suffer severe emotional distress, and the jury awarded no damages.

On December 15, 1994, a hearing was held to consider plaintiffs' request for injunctive relief. Defendants argued there was no evidence of ongoing harm, nor any danger of ongoing harm, and the court responded: "Well, there was evidence presented sufficient for the jury to find that . . . as to four plaintiffs who were working there, all of whom had a common characteristic, that is, that they were Latinos or members of Hispanic Latino racial ancestry, Lawrence had engaged in acts of harassment so continual and severe as to alter the working conditions for those people there, because that was the statutory test; [¶] Secondly, that Avis knew or should have known of that harassment. It may be that the bringing of the action at the Department of Fair Employment and Housing and the action here had a chilling effect on the harassment. But I want to make sure that that chilling effect survives the end of this process."

The court further stated during the hearing: "Well, the court is making a finding of fact based on evidence observed during the trial, that based on the evidence showing harassment and discrimination to the extent already commented on by Mr. Lawrence, there's a substantial likelihood based on his actions that he will do so in the future unless restrained."

On February 14, 1995, the court entered judgment awarding damages against Avis in the amount of $15,000 each to Hernandez, Lazo, Ramirez, Reyes, and Serrano, and damages against Avis and Lawrence jointly and severally in the amount of $25,000 each to Mojica, Peraza, and Recinos. The court also issued an injunction that stated as follows: "Defendant John Lawrence shall cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc., and shall further refrain from any uninvited intentional touching of said Hispanic/Latino employees, as long as he is employed by Avis Rent A Car System, Inc., in California. [¶] Defendant Avis Rent A Car System, Inc. shall cease and desist from allowing defendant John Lawrence to commit any of the acts described in [the above quoted paragraph], under circumstances in which it knew or should have known of such acts; and shall further not investigate or permit investigations regarding breaches of its employment rules or practices when such investigations are limited

to subjects or targets who are Hispanic/Latino employees of said defendant, unless the circumstances are such that no employees other than Hispanic/Latinos are reasonably subjects or targets of such investigation(s)."

The injunction further ordered Avis to post certain notices advising employees to report any instances of discriminatory or harassing conduct by Avis or its employees and to "publish a policy statement in English and Spanish delineating employee rights and manager responsibilities with regard to employee complaints of racial or national origin harassment or discrimination . . . ."

Defendants appealed "from the mandatory and prohibitory injunction portion of the Judgment," providing the Court of Appeal with the reporter's transcript of the post-trial hearing at which the injunction was issued, but not providing the court with a reporter's transcript of the trial proceedings. Defendants further elected to prepare an appellants' appendix in lieu of a clerk's transcript.

The Court of Appeal concluded "that to the extent the injunction prohibits Lawrence from continuing to use racist epithets in the workplace it is constitutionally sound, but to the extent it reaches beyond the workplace it improperly exceeds the scope of the FEHA violation sought to be prevented and must be modified accordingly." The Court of Appeal reversed the injunctive portion of the judgment and remanded the case to the trial court with directions to "redraft the injunction in a manner that . . . limits its scope to the workplace." In response to defendants' argument that the injunction's prohibition of the use of "derogatory racial or ethnic epithets" was vague, the Court of Appeal further ordered the trial court to add "an exemplary list of prohibited derogatory racial or ethnic epithets, specifying epithets such as those actually used in the workplace by Lawrence" in order to "more precisely warn Lawrence and Avis what is forbidden." Plaintiffs have not challenged the Court of Appeal's restriction of the terms of the injunction, but Avis and Lawrence sought review of that court's decision, arguing that the injunction, even as limited by the Court of Appeal, constitutes an improper prior restraint of freedom of expression. We granted review to address this question.

II

The FEHA declares "as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age." (§ 12920.) "This court has declared that policy to be 'fundamental.' " (*Brown* v. *Superior Court* (1984) 37 Cal.3d 477, 485.) "Employment discrimination 'foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.' (§ 12920.) The express purpose of the FEHA is 'to provide effective remedies which will eliminate such discriminatory practices.' (*Ibid.*) In addition, the Legislature has directed that the FEHA is to be construed 'liberally' so as to accomplish its purposes. (§ 12993.)" (*Brown* v. *Superior Court*, *supra*, 37 Cal.3d at p. 486.)

One form of employment discrimination is harassment on the basis of race or national origin. Section 12940, subdivision (h)(1), states that it is unlawful: "For an employer . . . or any other person, because of race . . . [or] national origin . . . to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action."[2] California Code of Regulations, title 2, section 7287.6, subdivision (b)(1)(A), defines harassment to include "[v]erbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act[.]"

Verbal harassment in the workplace also may constitute employment discrimination under title VII of the Civil Rights Act of

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[2] Avis and Lawrence move to augment the record on appeal with a document entitled "Jury Instruction No. 23" that states, in pertinent part, that "John Lawrence is not a supervisor of Avis." Plaintiffs object on the ground, among others, that this motion is untimely. We deny the motion to augment the record, but observe that it does not appear from the special verdicts that the jury found that Lawrence was a "supervisor" of plaintiffs within the meaning of section 12940, subdivision (h)(1).

1964 (42 U.S.C. § 2000e et seq.; Title VII), the federal counterpart of the FEHA. (*Meritor Savings Bank* v. *Vinson* (1986) 477 U.S. 57; *Beyda* v. *City of Los Angeles* (1998) 65 Cal.App.4th 511, 517 [Title VII cases may be considered in interpreting the FEHA.].) Explaining the potentially debilitating effects of this form of employment discrimination, the United States Supreme Court has observed: "A discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." (*Harris* v. *Forklift Systems, Inc.* (1993) 510 U.S. 17, 22 [126 L.Ed.2d 295, 302]; *Davis* v. *Monsanto Chem. Co.* (6th Cir. 1988) 858 F.2d 345, 349.)

Of course, not every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: "[N]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII. [Citations.] For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' [Citation.]" (*Meritor Savings Bank* v. *Vinson*, *supra*, 477 U.S. 57, 67.) The high court reaffirmed this standard in *Harris* v. *Forklift Systems, Inc.*, *supra*, 510 U.S. 17, 21-22 [126 L.Ed.2d 295, 302]: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." Recently, the high court observed that it had "made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment . . . ." (*Faragher* v. *City of Boca Raton* (1998) 524 U.S. 775 [141 L.Ed.2d 662, 677].)

California courts have adopted the same standard in evaluating claims under the FEHA. In rejecting a FEHA claim that alleged acts of sexual harassment directed toward other women had created a hostile work environment for the plaintiff, the Court of Appeal in *Fisher* v. *San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590 held that the harassment complained of must be "sufficiently

pervasive so as to alter the conditions of employment and create an abusive working environment . . . ." (*Id.* at p. 608.) "The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that she was actually offended." (*Id.* at pp. 609-610, fn. omitted.) "[H]arassment cannot be occasional, isolated, sporadic, or trivial[;] rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature. [Citation.]" (*Id.* at p. 610.)

In the present case, Avis and Lawrence do not contest the validity of that portion of the judgment awarding monetary damages against them. They concede that the jury's findings that they violated the FEHA are supported by substantial evidence and they do not claim that the damage award violates the First Amendment. For purposes of this case, therefore, it is established that Lawrence's conduct created a hostile or abusive work environment for plaintiffs on the basis of race, and that Avis properly was held liable for knowingly failing to prevent this misconduct by Lawrence.[3] (See *Lai* v. *Prudential Insurance Co.* (1998) 62 Cal.App.4th 220, 225-226; *Matthews* v. *Superior Court* (1995) 34 Cal.App.4th 598, 603-604; *Page* v. *Superior Court* (1995) 31 Cal.App.4th 1206, 1210.)

III

Avis and Lawrence challenge only that portion of the judgment awarding injunctive relief. It is beyond question that, in general, both the Department of Fair Employment and Housing and courts enforcing the FEHA are empowered not only to redress past

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[3] The question whether, and to what extent, the regulation of speech that constitutes racial or sexual harassment may violate the First Amendment has been the subject of scholarly debate. (Compare Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment* (1991) 52 Ohio St. L.J. 481; and Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment* (1993) 68 Notre Dame L.Rev. 1003, with Comment, *Freedom of Speech and Workplace Harassment* (1992) 39 U.C.L.A. L.Rev. 1791; and Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight* (1995) 47 Rutgers L.Rev. 461.) Because defendants have not challenged the finding that their past conduct amounted to unlawful employment discrimination in violation of the FEHA, we need not, and do not, address that broad issue here.

instances of employment discrimination, but to prevent a recurrence of such misconduct. Section 12920 states that the purpose of the FEHA is "to provide effective remedies which will eliminate" employment discrimination. Section 12920.5 adds: "In order to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons." Accordingly, if the Fair Employment and Housing Commission finds that an employer has engaged in an unlawful practice, it may order the employer "to cease and desist from the unlawful practice." (§ 12970, subd. (a).) Further, the Commission may order "[a]ffirmative or prospective relief to prevent the recurrence of the unlawful practice." (§ 12970, subd. (a)(5).) Similarly, courts can, and often do, issue injunctions prohibiting the recurrence or continuation of employment discrimination. We have held "that, in a civil action under the FEHA, all relief generally available in noncontractual actions . . . may be obtained." (*Commodore Home Systems, Inc.* v. *Superior Court* (1982) 32 Cal.3d 211, 221.) This includes injunctive relief. (*Snipes* v. *City of Bakersfield* (1983) 145 Cal.App.3d 861, 869-870.)

Avis and Lawrence argue initially that the injunction was unnecessary, because the record does not demonstrate that "Lawrence used words that are constitutionally proscribable." As noted above, the jury determined that Lawrence's conduct violated the FEHA, and defendants concede that this finding is supported by substantial evidence. The record before this court does not reveal the precise words used by Lawrence, because defendants elected not to provide a reporter's transcript of the trial proceedings. We reject defendants' claim, therefore, because they failed to provide this court with a record adequate to evaluate this contention. (*Ballard* v. *Uribe* (1986) 41 Cal.3d 564, 574-575.)

Defendants also argue that the injunction was unnecessary because the record does not demonstrate that Lawrence "engaged in ongoing conduct that arguably might justify injunctive relief." The trial court found to the contrary, stating: "[T]he court is making a finding of fact based on evidence observed during the trial, that based on the evidence showing harassment and discrimination to the extent already commented on by Mr. Lawrence, there's a substantial likelihood based on his actions that he will do so in the future unless

restrained." In order to prevail on this claim, defendants must show that this finding is not supported by substantial evidence. But, as noted above, defendants elected not to provide a reporter's transcript of the trial proceedings. Accordingly, they have no basis upon which to argue that the evidence adduced at trial was insufficient to support the trial court's finding that injunctive relief was necessary to prevent a continuation of defendants' unlawful conduct.

Defendants claim we must conclude that injunctive relief is unnecessary, because it appears from the trial court's comments that Lawrence had ceased his unlawful conduct during the pendency of the present proceedings. The trial court rejected this contention, observing that "[i]t may be that the bringing of the action at the Department of Fair Employment and Housing and the action here had a chilling effect on the harassment," and finding that "based on the evidence showing harassment and discrimination [by Mr. Lawrence] to the extent already commented on . . . , there's a substantial likelihood based on his actions that he will do so in the future unless restrained." The trial court did not err in so ruling. The mere fact that a defendant refrains from unlawful conduct during the pendency of a lawsuit does not necessarily preclude the trial court from issuing injunctive relief to prevent a post-trial continuation of the unlawful conduct.

"[M]any courts have rejected arguments against injunctive relief where defendants changed their practices only in response to being sued." (2 Lindemann, Employment Discrimination Law (3d ed. 1996) ch. 40, p. 1748, fn. omitted.) "Generally, a person subjected to employment discrimination is entitled to an injunction against future discrimination, [citation], unless the employer proves it is unlikely to repeat the practice, [citations]. . . . An employer that takes curative actions only after it has been sued fails to provide sufficient assurances that it will not repeat the violation to justify denying an injunction." (*EEOC* v. *Goodyear Aerospace Corp.* (9th Cir. 1989) 813 F.2d 1539, 1544; *EEOC* v. *Frank's Nursery & Crafts, Inc.* (6th Cir. 1999) ___ F.3d ___ [1999 WL 235476, 1, 17] ["upon a finding of any intentional employment discrimination, a district court possesses broad discretion to craft an injunction that will ensure the employer's compliance with the law"]; *Dombeck* v. *Milwaukee Valve Co.* (7th Cir. 1994) 40 F.3d 230, 238 [injunction proper although harasser and victim had been reassigned to different

work areas]; *EEOC* v. *Gurnee Inn Corp.* (7th Cir.1990) 914 F.2d 815, 817 [injunction prohibiting future sexual harassment proper although the employment of the sole harasser had been terminated]; cf. *Marin County Bd. of Realtors, Inc.* v. *Palsson* (1976) 16 Cal.3d 920, 929 [" 'the voluntary discontinuance of alleged illegal practices does not remove the pending charges of illegality from the sphere of judicial power or relieve the court of the duty of determining the validity of such charges where by the mere volition of a party the challenged practices may be resumed.' [Citation.]"].)

IV

Avis and Lawrence further claim that the injunction is invalid because it is a prior restraint that violates their rights to free speech guaranteed by the First Amendment to the federal Constitution, and article I, section 2, of the California Constitution. We first consider defendants' claims under the federal Constitution.

A.

The First Amendment to the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech . . . ." This fundamental right to free speech applies to the states through the Fourteenth Amendment's due process clause. (*Gitlow* v. *New York* (1925) 268 U. S. 652, 666.)

Although stated in broad terms, the right to free speech is not absolute. (*Near* v. *Minnesota* (1931) 283 U.S. 697, 708 ["Liberty of speech and of the press is also not an absolute right, and the state may punish its abuse. Whitney v. California, supra; Stromberg v. California, supra."].) Many crimes can consist solely of spoken words, such as soliciting a bribe (Pen. Code, § 653f), perjury (Pen. Code, § 118), or making a terrorist threat (Pen. Code, § 422). As we stated in *In re M.S.* (1995) 10 Cal.4th 698, 710: "[T]he state may penalize threats, even those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection. [Citations.] In this context, the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, ' "communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs . . . ." ' [Citations.]" (See also *NAACP* v. *Claiborne Hardware Co.* (1982) 458

U.S. 886, 916; *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.* (1941) 312 U.S. 287, 292, 295; Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark* (1995) 1994 Sup. Ct. Rev. 1, 13.) Civil wrongs also may consist solely of spoken words, such as slander and intentional infliction of emotional distress. A statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity. (*Roberts* v. *United States Jaycees* (1984) 468 U.S. 609, 628 ["[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent — wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection."])

This reasoning applies equally when spoken words, either alone or in conjunction with conduct, amount to employment discrimination. As already noted, the United States Supreme Court has held that the use of racial epithets that is sufficiently severe or pervasive constitutes "employment discrimination" in violation of Title VII (*Harris* v. *Forklift Systems, Inc.*, *supra*, 510 U.S. 17; *Meritor Savings Bank* v. *Vinson*, *supra*, 477 U.S. 57), and these decisions are at least implicitly inconsistent with any suggestion that speech of this nature is constitutionally protected. Furthermore, in *R.A.V.* v. *St. Paul*, *supra*, 505 U.S. 377, 389, the high court made this point explicit in discussing certain circumstances in which spoken words are not constitutionally protected, stating: "[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets) . . . speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. [Citations.] Thus, for example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimina-

tion in employment practices. [citations]." (See also *Wisconsin* v. *Mitchell* (1993) 508 U.S. 476, 487.)[4]

Justice Werdegar's concurring opinion asserts that we fail to "address . . . a critical preliminary question, that is, whether the First Amendment permits imposition of civil liability under FEHA for pure speech that creates a racially hostile or abusive work environment," and asserts that this issue takes us "into uncharted First Amendment waters." (Conc. opn. of Werdegar, J., *post*, at pp. 1-2.) To the contrary, as noted above, we conclude that it is clear from the high court's decisions in *Harris*, *supra*, *Meritor*, *supra*, and *R.A.V.*, *supra*, that the First Amendment permits imposition of civil liability for past instances of pure speech that create a hostile work environment. Defendants do not argue otherwise. The sole issue in the present case is whether the First Amendment also permits the issuance of an injunction to prohibit the continuation of such discriminatory actions.

It is not surprising that defendants concede that the First Amendment permits the imposition of civil liability for pure speech that violates the FEHA, because the high court's opinions, discussed above, leave little room for doubt on this score. As noted above, in *R.A.V.* v. *St. Paul*, *supra*, 505 U.S. 377, 389, the high court demonstrated its point that some forms of pure speech are not constitution-

[4] Relying upon the decision in *R.A.V.* v. *St. Paul*, *supra*, 505 U.S. 377, the Court of Appeal in the present case upheld the injunction because it was aimed at the "secondary effects" of Lawrence's use of racial epithets. We do not agree that the "secondary effects" doctrine applies in the present case. In *Boos* v. *Barry* (1988) 485 U.S. 312, the high court held that a Washington, D.C., ordinance prohibiting the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into "public odium" or "public disrepute" was an impermissible content-based restriction of speech, not a permissible content-neutral regulation of conduct aimed only at the secondary effects of speech. The court stated: "The emotive impact of speech on its audience is not a 'secondary effect.'" (*Id.* at p. 321.) Similarly, in the present case, the effects of Lawrence's use of racial epithets on plaintiffs is not a "secondary effect." (Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, *supra*, 1994 Sup. Ct. Rev. 1, 17 ["Despite occasional suggestions to the contrary, prohibitions against sexual harassment cannot be justified on the rationale that creation of a hostile environment is a prohibitable secondary effect."]; (Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, *supra*, 47 Rutgers L.Rev. 461, 511, fn. 215.)

ally protected, by observing that words "may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." One commentator observed: "When the majority and concurring opinions are viewed in conjunction, it appears that all nine Justices participating in *R.A.V.* assumed that the core Title VII prohibition against speech that creates a discriminatorily hostile work environment would pass constitutional muster. *Harris*, coming less than two years after the decision in *R.A.V.*, buttresses this impression." (Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, *supra*, 1994 Sup. Ct. Rev. 1, 12.) Like Professor Fallon, we do not find the message of *R.A.V.*, *Harris*, and *Meritor* nearly as opaque as suggested in the concurring opinion.[5]

[5] The concurring opinion cites several law review articles for the proposition that "the question [whether the First Amendment permits imposition of civil liability for pure speech that creates a hostile work environment] is one of considerable debate among First Amendment scholars" (conc. opn. of Werdegar, J., *post*, at p. 2, fn. omitted), but the controversy reflected in the cited articles has a different focus. Although there is considerable academic debate concerning *the extent to which* sexually and racially discriminatory speech may be regulated, consistent with the First Amendment, with a single exception every scholar cited by the concurring opinion agrees that, in some circumstances, pure speech that violates Title VII is not protected by the First Amendment.

Professor Sangree believes "that hostile environment law passes First Amendment scrutiny" and "concludes that while debate concerning the parameters of protected speech and unlawful discrimination can clarify why hostile environments are prohibitable, Title VII protections should not be curtailed." (Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, *supra*, 47 Rutgers L.Rev. 461, 465, 479.) Professor Strauss discusses at length the extent to which "sexist speech" in the workplace is protected by the First Amendment, but has no difficulty concluding that speech that violates Title VII is not protected: "Once the plaintiff alleges a cause of action under Title VII, and demonstrates a discriminatory intent or effect, the employer cannot successfully defend on first amendment grounds." (Strauss, *Sexist Speech in the Workplace* (1990) 25 Harv. C.R.-C.L. L.Rev. 1, 46.) Professor Volokh concludes that only the prohibition of "undirected" speech that contributes to the creation of a hostile work environment would offend the First Amendment: "Liability could be imposed not for any speech that creates a hostile work environment, but only for speech that the speaker knows is offensive, that is directed at an employee because of her race, sex, religion, or national origin, and creates (together with whatever other nonspeech conduct might be present) a hostile work environment." (Comment, *Freedom of Speech and Workplace Harassment*, *supra*,

(continued...)

The concurring opinion ultimately agrees that speech that violates Title VII by permeating the workplace with " 'discriminatory intimidation, ridicule, and insult,' [citation], that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and created an abusive work environment,' [citation]" (*Harris, supra*, 510 U.S. 17, 21) is not protected by the First Amendment, but the concurring opinion reaches this conclusion primarily by weaving together "strands of analysis" from several areas of First Amendment jurisprudence. (Conc. opn. of Werdegar, J., *post*, at pp. 3, 12.) We find such efforts unnecessary in light of the rulings of the United States Supreme Court in *Harris, supra*, and *Meritor, supra*, and the statement in *R.A.V.* v. *St. Paul, supra*, that harassing speech that is

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[5](...continued)
39 U.C.L.A. L.Rev. 1791, 1846.) Professor Fallon states: "After Harris . . . it is virtually inconceivable that the Supreme Court might hold that the First Amendment forbids the imposition of Title VII liability for a broad category of sexually harassing speech. Some trimming of the cause of action remains possible, but it is highly unlikely that workplace expressions of gender-based hostility and communications of explicitly sexual messages will receive categorical protection." (Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark, supra*, 1994 Sup. Ct. Rev. 1, 9.) Professor Gerard, although arguing that the federal guidelines implementing Title VII's prohibition of sexual harassment are unconstitutionally overbroad, states: "Various forms of pure speech are also unprotected: the sexual solicitation, the false and defamatory statement of fact, and the display of obscene graphics. These are some of the worst abuses and can be eliminated without hindrance." (Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment, supra*, 68 Notre Dame L.Rev. 1003, 1034.) Professor Gerard also questions whether "profane and vulgar words" could be prohibited. (*Id.* at p. 1035.) Only Professor Browne argues that the First Amendment prohibits all violations of Title VII based primarily on speech. (Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment, supra*, 52 Ohio St. L.J. 481.)
As explained above, in this case we have no occasion to address the issue on which these commentators are divided, because defendants have not provided a record that discloses the precise nature or extent of the racial epithets and insults that were found by the jury to have created a racially abusive working environment, and because defendants do not contend that the past racial epithets and insults, found by the jury, comprise constitutionally protected speech for which no damage award may be imposed. None of the cited law review articles specifically address the much narrower issue presented by this case, namely, whether once it has been judicially determined that a racially abusive working environment has been created by pervasive racial epithets and insults, a court may enjoin the offending employee from uttering similar racial epithets in the future that will perpetuate the discriminatory abusive environment.

sufficiently severe or pervasive to constitute employment discrimination is not constitutionally protected.[6]

Defendants contend that, although it is proper to punish a defendant after the fact for a violation of the FEHA based upon spoken words, the trial court's injunction against the use of future epithets is an invalid prior restraint of speech. (*Organization for a Better Austin* v. *Keefe* (1971) 402 U.S. 415, 419; *Near* v. *Minnesota, supra*, 283 U.S. 697, 713.) Under well-established law, however, the injunction at issue is not an invalid prior restraint, because the order was issued only after the jury determined that defendants had engaged in employment discrimination, and the order simply precluded defendants from continuing their unlawful activity.

In *Kingsley Books, Inc.* v. *Brown* (1957) 354 U.S. 436, 437, the United States Supreme Court upheld a criminal provision authorizing a " 'limited injunctive remedy' " prohibiting "the sale and distribution of written and printed matter found after due trial to be obscene." The defendants did not contest that the printed material at issue was obscene, but argued that issuance of an injunction "amounts to a prior censorship" in violation of the First Amendment. (*Id.* at p. 440.) The high court rejected this argument, quoting *Near* v. *Minnesota, supra*, 283 U.S. 697, 716, for the proposition that "the protection even as to previous restraint is not absolutely unlimited," and observing: "The phrase 'prior restraint' is not a self-wielding

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[6] Justice Brown's dissenting opinion quotes numerous decisions that eloquently explicate the unquestioned proposition that the First Amendment protects the expression of ideas that are reviled as well as those that are revered. But just as it is perfectly clear that the First Amendment does not protect an individual's right to commit treason (or, for that matter, securities fraud) through the use of the spoken word, it is equally clear that the First Amendment does not protect an employer's or employee's right to engage in employment discrimination through the use of the spoken word. An employer that posted a "Whites Only" sign outside its workplace could not claim that the First Amendment right of free expression shielded its "speech" from the reach of a law prohibiting racial discrimination in employment (cf. *Pittsburgh Press Co.* v. *Human Rel. Comm'n* (1973) 413 U.S. 376 ["male help wanted" and "female help wanted" designations constitute unprotected employment discrimination]), and an employer that utters or tolerates racial epithets or insults in the workplace that are so severe or pervasive as to alter the working conditions of targeted minority employees similarly may not take refuge in the claim that the racial harassment, because spoken, may not constitutionally be treated as employment discrimination.

sword. Nor can it serve as a talismanic test." (354 U.S. at p. 441.) In upholding the statute, the court noted that the defendants "were enjoined from displaying for sale or distributing only the particular booklets theretofore published and adjudged to be obscene." (*Id.* at p. 444.) The high court then distinguished as "glaringly different" (*id.* at p. 445) the decision in *Near* v. *Minnesota, supra*, 283 U.S. 697, in which the abatement as a public nuisance of a newspaper was found to be an invalid prior restraint, noting that the abatement in *Near* "enjoin[ed] the dissemination of future issues of a publication because its past issues had been found offensive," which is " 'the essence of censorship,' " while the injunction in *Kingsley Books* "studiously withholds restraint upon matters not already published and not yet found to be offensive." (354 U.S. at p. 445.)

In *Times Film Corp.* v. *Chicago* (1961) 365 U.S. 43, 44, a film distributor challenged a municipal ordinance that required "submission of all motion pictures for examination prior to their public exhibition," claiming this was an invalid prior restraint on expression. The film distributor argued that the state must permit the motion picture to be shown and only thereafter could punish any violation of law that occurred. The high court disagreed and upheld the ordinance, stating that the distributor's argument "is founded upon the claim of absolute privilege against prior restraint under the First Amendment — a claim without sanction in our cases." (*Id.* at p. 49.)

The decision in *Freedman* v. *Maryland* (1965) 380 U.S. 51, reaffirmed the rule announced in *Times Film Corp.* v. *Chicago, supra*, 365 U.S. 43, that a requirement of submission of motion pictures in advance of exhibition does not necessarily constitute an invalid prior restraint, but clarified that such a requirement must include "procedural safeguards designed to obviate the dangers of a censorship system." (*Freedman* v. *Maryland, supra*, 380 U.S. at p. 58.) One such safeguard is that before an injunction may issue prohibiting the exhibition of a motion picture, there must be a judicial determination that the film does not constitute protected expression. The high court stated: "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. [Citations.]" (*Ibid.*)

In *Paris Adult Theatre I* v. *Slaton* (1973) 413 U.S. 49, 55, the high court upheld a Georgia statute authorizing an injunction prohibiting the exhibition of obscene materials, stating: "Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected."

In *Pittsburgh Press Co.* v. *Human Rel. Comm'n., supra*, 413 U.S. 376, the United States Supreme Court upheld an order prohibiting a newspaper from publishing advertisements in a manner that would constitute employment discrimination. The city ordinance at issue in that case proscribed discrimination in employment in a manner similar to the FEHA and had been interpreted to forbid newspapers from carrying "help wanted" advertisements in gender-designated columns under captions such as "Male Help Wanted" and "Female Help Wanted." Observing that the ordinance made sexual discrimination in employment illegal, the high court held that the First Amendment did not protect such illegal conduct, stating: "We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." (413 U.S. at p. 388.) The high court concluded: "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."[7] (413 U.S. at p. 389.)

The court in *Pittsburgh Press Co.* then addressed the argument that the order forbidding the newspaper from publishing the advertisements in gender-designated columns was a prohibited prior restraint on expression. The high court, first noting that it never had held that all injunctions against newspapers were impermissible, stated: "The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is

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[7] In *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n* (1980) 447 U.S. 557, 566, the high court stated: "For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading." (*Rubin* v. *Coors Brewing Co.* (1995) 514 U.S. 476 [131 L.Ed.2d 532, 538-539].)

unprotected by the First Amendment. [¶] The present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication. [Citations.] Moreover, the order is clear and sweeps no more broadly than necessary. And because no interim relief was granted, the order will not have gone into effect before our final determination that the actions of Pittsburgh Press were unprotected." (*Id.* at p. 390, fn. omitted; see also *Madsen* v. *Women's Health Center* (1994) 512 U.S. 753, 764, fn. 2 [129 L.Ed.2d 593, 607, fn. 2] ["Not all injunctions that may incidentally affect expression, however, are 'prior restraints' in the sense that the term was used in *New York Times Co., supra*, or *Vance, supra*."].)

The foregoing high court decisions recognize that once a court has found that a specific pattern of speech is unlawful, an injunctive order prohibiting the repetition, perpetuation, or continuation of that practice is not a prohibited "prior restraint" of speech. (*Kramer* v. *Thompson* (3rd Cir. 1991) 947 F.2d 666, 675 ["The United States Supreme Court has held repeatedly that an injunction against speech generally will not be considered an unconstitutional prior restraint if it is issued after a jury has determined that the speech is not constitutionally protected."]; *Intern. Union, United Auto., etc.* v. *Dana Corp.* (6th Cir. 1982) 679 F.2d 634, 646-647 ["A court may validly restrain communications which are not protected by the First Amendment."].) For the same reason, the injunction at issue in the present case does not constitute a prohibited prior restraint on expression, provided the order "is clear and sweeps no more broadly than necessary." (413 U.S. 376, 390.) The injunction at issue is based upon a continuing course of repetitive speech that has been judicially determined to violate the FEHA. Thus, prohibiting Avis and Lawrence from continuing to violate the FEHA does not violate their First Amendment rights.

A persuasive discussion is found in *Auburn Police Union* v. *Carpenter* (1st Cir. 1993) 8 F.3d 886, which upheld a Maine statute prohibiting persons from soliciting property for the benefit of a law enforcement officer, agency, or association. Violations of the statute could be enjoined and penalized civilly. The court of appeals rejected the argument that an injunction against such solicitation necessarily would constitute an invalid prior restraint on expression:

"A prior restraint is a government regulation that limits or conditions in advance the exercise of protected First Amendment activity. [Citation.] Although the classic form of prior restraint involves an administrative licensing scheme, [citation], a judicial injunction that prohibits speech prior to a determination that the speech is unprotected also constitutes a prior restraint. [Citation.] Any system of prior restraints of speech 'comes to this Court bearing a heavy presumption against its constitutional validity.' [Citation.] [¶] . . . [¶] The Supreme Court, however, 'has never held that all injunctions are impermissible.' [Citation.] 'The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.' [Citation.] An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint.' " (*Id.* at p. 903; *Retail Credit* v. *Russell* (1975) 234 Ga. 765, 779 [218 S.E.2d 54] [" 'The present order [an injunction prohibiting the defendant from continuing to report false credit information about the plaintiff] does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the court is asked to speculate as to the effect of publication.' "]; *Haseotes* v. *Cumberland Farms, Inc.* (Bankr. D. Mass. 1997) 216 B.R. 690, 695.)[8]

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[8] In a variety of contexts, courts have upheld injunctions prohibiting the continuation of a course of expressive conduct that violates a specific statutory prohibition. (*Vendo Co.* v. *Lektro-Vend Corp.* (1997) 433 U.S. 623, 635, fn. 6 ["nothing . . . prevents a federal court . . . [from] enjoin[ing] the commencement of additional state-court proceedings if it concludes from the course and outcome of the first one that such proceedings would constitute a violation of the antitrust laws"]; *San Antonio Community Hospital* v. *Southern California District Council of Carpenters* (9th Cir. 1997) 125 F.3d 1230 [upholding preliminary injunction against union to prohibit continuing display near hospital entrance of fraudulent banner reading "THIS MEDICAL FACILITY IS FULL OF RATS"]; *Lothschuetz* v. *Carpenter* (6th Cir. 1990) 898 F.2d 1200 [directing entry of a "narrow and limited injunction to prohibit [the defendant] from continuing and reiterating the same libelous and defamatory charges."]; *O'Brien* v. *University Community Tenants Union, Inc.* (1975) 42 Ohio St.2d 242 [327 N.E.2d 753, 755] ["Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an

(continued...)

By parity of reasoning, the pervasive use of racial epithets that has been judicially determined to violate the FEHA is not protected by the First Amendment, and such unlawful conduct properly may be enjoined. (Cf. *EEOC* v. *Beverage Canners, Inc.* (11th Cir.1990) 897 F.2d 1067, 1070 [upholding injunction directed to racially abusive language in workplace, without addressing free speech issues]; *Robinson* v. *Jacksonville Shipyards, Inc.* (M.D. Fla. 1991) 760 F. Supp. 1486 [holding that First Amendment does not bar injunctive relief against continuing course of conduct found to constitute sexual harassment, including verbal harassment and display of sexually explicit photographs: "[T]he pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment."].) As the amicus curiae brief of the American Civil Liberties Union of Northern California suggests, the controlling authorities establish that "[s]peech may be enjoined where a fair judicial process has determined that a repetitive pattern of speech is unprotected."

B.

Defendants also argue that the injunction violates the California Constitution. Article I, section 2, subdivision (a), of the California Constitution states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Avis and Lawrence rely heavily on a decision of this court, handed down more than a century ago, interpreting an earlier version of this provision.

In *Dailey* v. *Superior Court* (1896) 112 Cal. 94, 97, this court invalidated a superior court order prohibiting the performance or advertising of a play that was based upon the circumstances of a pending criminal case that was about to go to trial, unequivocally

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[8](...continued)
injunction for restraint of continued publication of that *same* speech may be proper." (Italics in original.)]; *Advanced Training Systems, Inc.* v. *Caswell Equipment Co., Inc.* (Minn. 1984) 352 N.W.2d 1, 11 ["We therefore hold that the injunction below, limited as it is to material found either libelous or disparaging after a full jury trial, is not unconstitutional and may stand."]; *Federal Trade Comm'n* v. *Sana* (D. Ariz. Oct. 7, 1997) 1997 WL 703399 [upholding injunction prohibiting continuation of fraudulent solicitations of charitable donations.])

declaring: "We are entirely clear that the court had no jurisdiction to make the order which forms the basis of this proceeding, for such order was an attempted infringement upon rights guaranteed to every citizen by section 9, article I, of the constitution of this state. That section provides: 'Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right; and no law shall be passed to restrain or abridge liberty of speech or of the press.' The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility."

The above quoted language in *Dailey* cannot be interpreted as broadly as defendants suggest, to prohibit a court, under all circumstances, from enjoining "speech." The circumstances in *Dailey* involved a true prior restraint in which the superior court had prohibited the production of a play prior to its first performance simply because the play was based upon the circumstances of a pending criminal case. The court in *Dailey* was not faced with the question whether an injunction prohibiting the continuation of conduct that has been judicially determined to be unlawful constitutes a prior restraint. *Dailey*, therefore, does not support the position that the injunction in the present case constitutes an invalid prior restraint. (*Ginns* v. *Savage* (1964) 61 Cal.2d 520, 524, fn. 2 ["Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered."].)

Recent decisions of this court demonstrate that we have not adopted the rule advocated by defendants, that any injunction impinging upon the right of free expression constitutes an invalid prior restraint. In *Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, while we observed that our state constitutional guarantee of free speech and press is "more definitive and inclusive than the First Amendment" (*id.* at p. 658), we recognized at the same time that "an

injunction restraining speech may issue in some circumstances to protect private rights [citation] or to prevent deceptive commercial practices [citation]." (*Id.* at p. 662.) In *People* ex rel. *Busch* v. *Projection Room Theatre* (1976) 17 Cal.3d 42, 57, we rejected the argument that enjoining the exhibition of obscene films or magazines would constitute an impermissible prior restraint, stating: "Thus, in the matters before us if the trial court finds the subject matter obscene under prevailing law an injunctive order may be fashioned that is 'proper and suitable' in each case. *It is entirely permissible from a constitutional standpoint to enjoin further exhibition of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing.* (*Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U.S. 49, 54-55.)" (Italics added.)

In *Goldin* v. *Public Utilities Commission* (1979) 23 Cal.3d 638, we affirmed an order of the Public Utilities Commission terminating a subscriber's telephone service on the ground that the service was being used to violate the law. At hearings before the commission, evidence was introduced establishing that the subscriber was operating a business offering outcall massage and nude modeling services. The commission found that the subscriber's telephone service had been used to facilitate the violation of Penal Code section 647, subdivision (b), which prohibits soliciting or engaging in an act of prostitution. The subscriber argued that terminating his telephone service violated his right to free speech. We rejected this argument, quoting the high court's decision in *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, *supra*, 413 U.S. 376: "[T]elephone communication which does 'no more than propose a commercial transaction' can be . . . protected 'commercial speech.' By the same token, however, when such communication proposes, discusses, or is intended to encourage or facilitate a commercial transaction *which is itself illegal*, the principle established in the *Pittsburgh Press* case is applicable. Thus: 'Any First Amendment interest which might be served by [telephone communications concerning] an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation *is altogether absent* when the commercial activity itself is illegal and the restriction on [telephone communication] is incidental to a valid limitation on economic activity.' " (23 Cal.3d at p. 657, italics in *Goldin*.)

Most recently, in *People* ex rel. *Gallo* v. *Acuna* (1997) 14

Cal.4th 1090, our court, in upholding against a First Amendment challenge the validity of an injunction restraining a wide array of future activities of gang members, explained that in a variety of respects a specific injunction, issued against a particular party on the basis of a proven past course of conduct, poses less of a danger to free speech interests than a general statutory prohibition. We noted: "As with any injunction, the preliminary decree here is addressed to identifiable parties and to specific circumstances; the enjoined acts are particularly described in the trial court's order. Unlike the pervasive 'chill' of an abstract statutory command that may broadly affect the conduct of an absent class and induce self-censorship, the decree here did not issue until after these defendants had had their day in court, a procedure that assures ' "a prompt and carefully circumscribed determination of the issue." ' [Citation.]" (14 Cal.4th at p. 1114.)

Under the California Constitution, as under its federal counterpart, the injunction in the present case thus does not constitute a prohibited prior restraint of speech, because defendants simply were enjoined from continuing a course of repetitive speech that had been judicially determined to constitute unlawful harassment in violation of the FEHA.

V

Defendants further claim that, even if some injunctive relief against future racial epithets is permissible, the order in this case is invalid because it is overly broad. As noted above, one provision of the injunction prohibited defendant Lawrence from "using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc. . . ." The Court of Appeal upheld this provision to the extent it prohibited Lawrence "from continuing to use racist epithets in the workplace," but ruled that, to the extent the prohibition applied to conduct outside the workplace, "it improperly exceeds the scope of the FEHA violation sought to be prevented and must be modified accordingly." In further response to defendants' claim, the Court of Appeal additionally restricted the injunction by directing the trial court to add to the injunction "an exemplary list of prohibited derogatory racial or ethnic epithets, specifying epithets, such as those actually used in the workplace by Lawrence" in order to "more precisely warn Lawrence and Avis what is forbidden." Because neither

plaintiffs nor defendants have sought review of those limitations of the scope of the injunction, their validity is not before us and we express no opinion on that matter.

Defendants assert that, even as modified by the Court of Appeal, the injunction is overly broad because it enjoins Lawrence from employing racially derogatory terms "descriptive of" Avis's Hispanic employees, even outside the hearing of those employees.

Defendants argue that the use of racial epithets outside the hearing of Hispanic employees does not contribute to a hostile work environment if the audience does not find the speech unwelcome and the subjects of the racial invective are unaware they are being maligned. The Court of Appeal disagreed, stating: "Continual use of racist epithets poisons the atmosphere of the workplace, even when some of the invective is not directed at or even heard by the victims. If the Hispanic/Latino employees at Avis's San Francisco airport location know that Lawrence is free to continue voicing his on-the-job racist epithets behind their backs, it will remain a hostile place at which to work. Under the present circumstances, where there was direct racist invective, continued indirect invective would serve to maintain an abusive work environment, and thus both are properly enjoined."

The United States Supreme Court has held that an injunction that imposes a content-neutral restriction upon expression must "burden no more speech than necessary to serve a significant government interest. [Citations.]" (*Madsen* v. *Women's Health Center*, *supra*, 512 U.S. 753, 765 [129 L.Ed.2d 593, 608]; *People* ex rel. *Gallo* v. *Acuna*, *supra*, 14 Cal.4th 1090, 1120.) The high court explained: "Our close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech is consistent with the general rule, quite apart from First Amendment considerations, 'that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.' [Citations.]" (*Madsen* v. *Women's Health Center*, *supra*, 512 U.S. at p. 765 [129 L.Ed.2d 593, 608].)

Because defendants elected not to provide a transcript of the trial proceedings, we have no basis upon which to conclude that, in the particular circumstances of this case, it was unnecessary to prohibit the use of the racial epithets even outside the hearing of plaintiffs, in order to prevent a continuation of the hostile work environment. It

certainly is possible that the use of racial epithets even outside the hearing of plaintiffs would contribute to an atmosphere of racial hostility that would perpetuate the hostile work environment created by defendants. Nothing in the limited record before us suggests that the injunction was more burdensome than necessary to prevent future violations of the FEHA.

The trial court found that John Lawrence's use of racial epithets was sufficiently severe or pervasive to constitute employment discrimination. The trial court further found that injunctive relief was necessary to prevent a continuation of the abusive work environment. Accordingly, the trial court enjoined Lawrence from "using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc." Because Lawrence's past use of such epithets in the workplace had been judicially determined to violate the FEHA, prohibiting him from continuing this discriminatory activity does not constitute an invalid prior restraint of speech.

VI

The judgment of the Court of Appeal is affirmed.

GEORGE, C.J.

WE CONCUR:

BAXTER, J.

CHIN, J.

CONCURRING OPINION BY WERDEGAR, J

This case presents the collision of two very basic values protected by the United States Constitution. The first is to live one's life free of racial discrimination. (U.S. Const., Amend. XIV.) The second is to speak one's mind free of government censorship. (U.S. Const., Amend. I.) The trial court balanced these two bedrock constitutional principles to conclude defendant John Lawrence validly could be enjoined from engaging in a form of speech a jury found was in violation of the Fair Employment and Housing Act. (Gov. Code, § 12900 et seq. [hereafter FEHA].) A divided Court of Appeal affirmed the trial court judgment, but remanded the case to the trial court with directions to narrow the terms of the injunction by limiting it to the workplace and to provide an exemplary list of prohibited words.

To the extent the plurality opinion affirms the judgment of the Court of Appeal, and with my understanding of the purpose and context of the "exemplary list" of words (see *post*, at p. 32, fn. 9), I concur.[1] I write separately because the plurality opinion does not address what I believe to be a critical preliminary question, that is, whether the First Amendment permits imposition of civil liability under FEHA for pure speech that creates a racially hostile or abusive work environment. By declining to address this question, the plurality opinion fails to acknowledge that we are with this case sailing into uncharted First Amendment waters. No decision by the United States Supreme Court has, as yet, declared that the First Amendment permits restrictions on speech creating a hostile work environment; indeed, the question is one of considerable debate among First Amendment scholars.[2] (Volokh, *How Harassment Law*

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[1] I also agree with the plurality opinion's conclusion that the "secondary effects" doctrine does not control this case. (Plur. opn., *ante*, pp. 14-15, fn. 4.)

[2] "There is a lively debate within First Amendment scholarship over the constitutional status of discriminatory verbal harassment, particularly in the workplace. A number of decisions finding harassment liability under Title VII have turned in whole or in part on what we would ordinarily recognize as 'speech'; yet few courts have seriously considered the relevance of the First Amendment in this regard. The commentators have stepped into the judicial vacuum with gusto. Some commentators have argued that Title VII's harassment law, as applied to nearly all speech, abridges the freedom of speech protected by the First Amendment. Others (continued...)

Restricts Free Speech (1995) 47 Rutgers L.Rev. 563; Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight* (1995) 47 Rutgers L.Rev. 461 (Sangree, *No Collision in Sight*); Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark* (1994) 1994 Sup. Ct. Rev. 1 (Fallon, *Sexual Harassment*); Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment* (1993) 68 Notre Dame L.Rev. 1003; Volokh, *Freedom of Speech and Workplace Harassment* (1992) 39 U.C.L.A. L.Rev. 1791 (Volokh, *Workplace Harassment*); Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment* (1991) 52 Ohio St. L.J. 481 (Browne, *Title VII as Censorship*); Strauss, *Sexist Speech in the Workplace* (1990) 25 Harv. C.R.-C.L. L.Rev. 1.) Accordingly, a serious question arises whether or not the injunction in this case constitutes an impermissible prior restraint on defendant John Lawrence's speech.

As I explain, despite the absence of any direct United States Supreme Court authority finding speech creating a hostile work environment falls outside the protection of the First Amendment, existing high court decisions provide strands of analysis that, woven together, produce a coherent theory that explains why the injunction in this case does not violate defendant Lawrence's First Amendment rights.

I

At the outset, I note the appellate record in this case is woefully inadequate. Defendants proceeded in this appeal by relying on an appellants' appendix in lieu of a clerk's transcript. This is a permissible choice under the rules governing appellate procedure (see rule 5.1, Cal. Rules of Court), but, as a consequence of that choice, the record does not reveal what defendant Lawrence said that

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[2](...continued)
have defended harassment law as both necessary to workplace equality and entirely consistent with free speech principles and doctrine. Still others situate themselves at some point in the middle and advocate some restrictions on the application of Title VII to speech." (Ugland, *The Architecture of the First Amendment and the Case of Workplace Harassment* (1997) 72 Notre Dame L.Rev. 1361, 1363-1364, fns. omitted.)

the jury found created a hostile work environment in violation of FEHA. The record also does not reveal how often he made the offending utterances or in what context. Defendants, of course, as the appellants in this case, bear the burden of providing a record on appeal that is adequate to adjudicate their claims. (*Null* v. *City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532, 1535; *Buckhart* v. *San Francisco Residential Rent etc., Bd.* (1988) 197 Cal.App.3d 1032, 1036; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 518, pp. 562-564.) If the record furnished is insufficient to establish the merits of an appellant's legal position, it is the appellant who bears the risk of uncertainty caused by the lacuna. (See, e.g., plur. opn., *ante*, pp. 10-11 [rejecting claims for failure to provide an adequate record]; *Null* v. *City of Los Angeles*, *supra*, at p. 1536.)

Even if defendants took this risk willingly, for an appellate court to adjudicate an important First Amendment case on such a sketchy record is unfortunate. Were we apprised of the nature and frequency of Lawrence's verbal outbursts against plaintiffs, perhaps we would find his speech did not actually create a hostile work environment, thereby rendering resolution of this important constitutional issue unnecessary. (See *People* v. *Hernandez* (1998) 19 Cal.4th 835, 845-848 (dis. opn. of Werdegar, J.) [court should not decide constitutional issues until necessary to do so]; *People* v. *Bennett* (1998) 17 Cal.4th 373, 393 (conc. opn. of Werdegar, J.) [same].) Were we provided with a record describing the nature of Lawrence's epithets, perhaps we would find, for example, that his speech fell into the category of so-called "fighting words," which the high court has found unprotected by the First Amendment. (See *Chaplinsky* v. *New Hampshire* (1942) 315 U.S. 568.) Or perhaps, if his offensive speech was combined with conduct, different First Amendment concerns would be implicated. (See *Texas* v. *Johnson* (1989) 491 U.S. 397; *United States* v. *O'Brien* (1968) 391 U.S. 367.)

Lacking a record that would resolve these questions, we must decide the case as we find it. I proceed now to explain briefly why I find the plurality opinion's analysis unsatisfactory; I next put forth a different analysis supportive of the judgment.

II

From the abbreviated record provided by defendants, we may discern that the jury found defendant Lawrence created a hostile work environment by engaging in a continuous pattern and practice

of using racial and other epithets to demean and embarrass a group of Latino workers. The plurality opinion concludes we need not in this case confront the thorny constitutional question of whether speech alone may constitute the basis for liability based on the creation of a hostile work environment, reasoning that "defendants have not challenged the finding that their past conduct amounted to unlawful employment discrimination in violation of the FEHA, [so] we need not, and do not, address that broad issue here." (Plur. opn., *ante*, p. 9, fn. 3.)

By taking this approach, the plurality opinion never establishes the speech at issue in this case is unprotected by the First Amendment. Although the opinion declares that under "well-established law" the injunction is not an invalid prior restraint, "because the order was issued only after the jury determined that defendants had engaged in employment discrimination, and the order simply precluded defendants from continuing their unlawful activity" (plur. opn., *ante*, p. 19), as discussed at greater length hereafter (*post*, at pp. 9-12), I can locate no authority from this court or the United States Supreme Court that concludes speech in the workplace that creates a racially hostile work environment, *standing alone*, can be made the basis of civil liability (under either FEHA or the similar federal law, title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) [hereafter title VII][3]) consistent with the First Amendment's guarantee that the state shall not make laws "abridging the freedom of speech." (See *Gitlow* v. *New York* (1925) 268 U.S. 652, 666 [applying the First Amendment to the states].)

The plurality opinion's implicit assumption that a legislative body can validly pass a statute having the effect of removing constitutional protection from speech is unfounded. For example,

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[3] Harassment in the workplace is also prohibited by federal law. (42 U.S.C. § 2000e et seq.) "Although the wording of title VII differs in some particulars from the wording of FEHA, the antidiscriminatory objectives and overriding public policy purposes of the two acts are identical." (*Beyda* v. *City of Los Angeles* (1998) 65 Cal.App.4th 511, 517.) "Where there is a dearth of state authority in an area of emerging law, such as employment discrimination, it is appropriate to consider federal cases interpreting title VII." (*Mogiletsky* v. *Superior Court* (1993) 20 Cal.App.4th 1409, 1416, fn. 5.) "Although they are not controlling, federal cases interpreting title VII are instructive when analyzing a FEHA claim." (*Spaziano* v. *Lucky Stores, Inc.* (1999) 69 Cal.App.4th 106, 112.)

the mere fact Congress has decreed (by enacting title VII) that the creation of an abusive or hostile work environment violates federal law does not necessarily mean racial speech creating such a work atmosphere is unprotected by the First Amendment. Congress cannot, by legislation, change the scope of one's First Amendment rights. (*United States* v. *Eichman* (1990) 496 U.S. 310 [Flag Protection Act of 1989 violated the First Amendment]; cf. *City of Boerne* v. *Flores* (1997) 521 U.S. 507 [Congress's attempt to redefine scope of free exercise clause by enacting the Religious Freedom Restoration Act of 1993 found unconstitutional].) Likewise, the mere fact the jury found defendant Lawrence was in violation of FEHA does not necessarily mean his speech was unprotected by the First Amendment.

In sum, by relying on the jury's finding that defendants were liable for violating FEHA, together with defendants' failure to challenge that finding on appeal, the plurality opinion attempts to resolve this case without deciding the critical First Amendment question involved. In contrast, I believe we must confront the fundamental preliminary question whether speech creating a racially hostile work environment is protected by the First Amendment. I now turn to that question.

III

I begin my analysis with the recognition that we must assume for purposes of this appeal that defendant Lawrence engaged in a pervasive practice of hurling racially-tinged insults at Latino workers, singling them out as the recipients of his offensive epithets. Defendant Avis Rent A Car Systems, Inc., Lawrence's employer, tolerated this outrageous workplace behavior and was thus complicit in the creation of a racially hostile and abusive work environment. Though I assume the majority of persons finds such words distasteful, their utterance nevertheless is generally protected by the free speech guarantee of the First Amendment to the United States Constitution. If Lawrence's invective would not have caused a reasonable person to react with violence (*Chaplinsky* v. *New Hampshire*, *supra*, 315 U.S. 568), if his words did not incite people to engage in imminent lawless action under circumstances making such action reasonably likely (*Brandenburg* v. *Ohio* (1969) 395 U.S. 444 (*per curiam*)), if his words were not obscene under the *Miller* test (*Miller* v. *California* (1973) 413 U.S. 15), if his words did not

come within some other category of speech the high court has found outside the First Amendment's protective umbrella, then an injunction prohibiting Lawrence from expressing himself in his chosen manner simply because we (or the Legislature) disagree with his message or wish to protect listeners against hurt feelings raises serious constitutional concerns.[4]

It is true Lawrence chose to express himself in a rude and provocative manner, inevitably producing feelings of anger, hostility and humiliation in his listeners, the plaintiffs here. However, "[i]nsults may contain a point of view that the speaker is entitled to express and his audience to hear. 'Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases.' " (Fried, *The New First Amendment Jurisprudence: A Threat to Liberty* (1992) 59 U. Chi. L.Rev. 225, 242, quoting *NAACP* v. *Claiborne Hardware Co.* (1982) 458 U.S. 886, 928; see also Greenawalt, *Insults and Epithets: Are They Protected Speech?* (1990) 42 Rutgers L.Rev. 287, 302 ["It is no coincidence that the less privileged and more radical are those who often use words and phrases that might be judged to impair civil discourse."].) As the Supreme Court has trenchantly observed, "[s]urely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." (*Cohen* v. *California* (1971) 403 U.S. 15, 25.)

What, then, of the rights of the Latino workers, who were the unwilling targets of Lawrence's racial invective? Do they have the

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[4] The law generally prohibiting prior restraints on speech is settled. "Any system of prior restraint . . . 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc.* v. *Sullivan*, [(1963)] 372 U. S. [58], at 70 [additional cites omitted]. The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." (*Southeastern Promotions, Ltd.* v. *Conrad* (1975) 420 U.S. 546, 558-559, italics in original.) The government bears a " 'heavy burden' " to justify a prior restraint. (*New York Times Co.* v. *United States* (1971) 403 U.S. 713, 714 (*per curiam*); *Organization for a Better Austin* v. *Keefe* (1971) 402 U.S. 415, 419.)

right *not* to listen, a right to work free of racial discrimination and intimidation? Do Lawrence's First Amendment rights trump their rights? Most fundamentally, do Lawrence's racially offensive epithets come within the protection of the First Amendment?

A. The Relevance of *R.A.V.* and *Harris*

As noted, *ante*, nothing in the decisions of the Supreme Court provides definitive guidance on whether racist speech at the workplace that is so pervasive and constant that it creates a hostile and abusive work environment is protected by the First Amendment's guarantee of freedom of speech. Hints from two decisions, however, suggest the high court considers such speech outside the protective scope of the First Amendment.

In 1992, the Supreme Court held the City of St. Paul's municipal ordinance banning certain hate speech was unconstitutional. (*R. A. V.* v. *St. Paul* (1992) 505 U.S. 377 (*R.A.V.*).) Justice Scalia, speaking for a five-justice majority, explained that, although fighting words in general are not protected by the First Amendment, the city's ordinance unconstitutionally engaged in viewpoint discrimination by prohibiting hate speech on some topics but not others. Noting the ordinance outlawed fighting words "that insult, or provoke violence, 'on the basis of race, color, creed, religion, or gender' " (*id.* at p. 391), the majority found it significant that "[d]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered." (*Ibid.*)

The justices concurring separately in the *R.A.V.* decision expressed concern that the majority's rationale called into question the constitutionality of sexual harassment claims under title VII, which declares it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." (42 U.S.C. § 2000e-2(a)(1).) Thus, Justice White, writing for four justices, stated that "[u]nder the broad principle the Court uses to decide the present case, hostile work environment claims based on sexual harassment should fail First Amendment review

. . . ." (*R.A.V.*, *supra*, 505 U.S. at pp. 409-410 (conc. opn. of White, J.).)

Addressing this question, Justice Scalia replied that title VII claims did not come within the ambit of the majority's analysis: "since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. [Citations.] Thus, for example, sexually derogatory 'fighting words,' *among other words*, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, [citations]." (*R.A.V.*, *supra*, 505 U.S. at p. 389, italics added.)

Of course, *R.A.V.* did not involve a title VII claim and thus its pronouncement on whether such a claim would survive under the First Amendment is dictum. Moreover, what Justice Scalia was referring to when he explained that, in addition to fighting words, some "other words" could produce a constitutionally valid hostile work environment claim under title VII is unclear. We need not unravel this conundrum, however. It is enough for us to recognize that "[w]hen the majority and concurring opinions are viewed in conjunction, it appears that all nine Justices participating in *R.A.V.* assumed that the core Title VII prohibition against speech that creates a discriminatorily hostile work environment would pass constitutional muster." (Fallon, *Sexual Harassment*, *supra*, 1994 Sup. Ct. Rev. at p. 12.) Thus, although *R.A.V.* did not "hold" that harassing workplace speech violative of title VII is unprotected speech, the opinions in the case suggest the court would so hold.

The next year, the Supreme Court gave a further hint of its views when it decided *Harris* v. *Forklift Systems, Inc.* (1993) 510 U.S. 17 (*Harris*). *Harris* concerned a sexual harassment claim under title VII, the basis of which involved both conduct and speech. For example, the defendant's male president made Harris, the plaintiff, the target of sexual innuendo and made comments such as " 'You're a woman, what do you know' " and that Harris was " 'a dumb ass woman.' " (*Harris*, *supra*, at p. 19.) He also made sexually suggestive comments about Harris's clothing. (*Ibid.*) Because the case involved the defendant's speech as a contributory factor to the

creation of a hostile work environment, "[s]ome observers therefore thought that the Supreme Court might use *Harris* to clarify the bearing of the First Amendment on sexual harassment law and, in doing so, might cut back sharply on accepted theories of Title VII liability." (Fallon, *Sexual Harassment*, *supra*, 1994 Sup. Ct. Rev. at pp. 1-2.) That both the parties and amici curiae briefed the First Amendment issue before the court further supported this belief. (*Id.* at pp. 9-10 & fns. 44-47.)

It was not to be. The Supreme Court in *Harris* simply found that, where an abusive and hostile work environment is created in violation of title VII, the plaintiff's entitlement to relief is not dependent on her ability to show she suffered psychological injury. (*Harris*, *supra*, 510 U.S. at p. 22.) Neither Justice O'Connor, who wrote for the *Harris* majority, nor Justices Scalia or Ginsburg, concurring separately, mention whether harassing speech, standing alone, may constitute a violation of title VII consistent with the First Amendment.[5]

The question thus remains open.[6] Nevertheless, I find strands of analysis in several high court decisions which, taken together, indicate that, even if speech creating a racially hostile or abusive work environment is protected by the First Amendment, such speech may be subject to some restrictions consistent with that amendment. I turn now to discussion of these strands.

B. Speech in the Workplace

Of course, speech is not wholly protected from government regulation in all places; the location of the speech is relevant to the degree of protection, if any, the speech will receive under the First Amendment. (*Frisby* v. *Schultz* (1988) 487 U.S. 474, 479 (*Frisby*) ["To ascertain what limits, if any, may be placed on protected

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[5] The *Harris* majority at one point noted that whether a hostile or abusive work environment exists under title VII requires consideration of several factors, including whether the harassing conduct is severe "or a mere offensive utterance." (*Harris*, *supra*, 510 U.S. at p. 23.)

[6] Professor Fallon argues that after *R.A.V.*, *supra*, 505 U.S. 377, and *Harris*, *supra*, 510 U.S. 17, "it is virtually inconceivable that the Supreme Court might hold that the First Amendment forbids the imposition of Title VII liability for a broad category of sexually harassing speech." (Fallon, *Sexual Harassment*, *supra*, 1994 Sup. Ct. Rev. at p. 9.)

speech, we have often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ."]; *Lehman* v. *City of Shaker Heights* (1974) 418 U.S. 298, 302-303 (plur. opn.) ["[T]he nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question."].)

For example, speech uttered in a traditional public forum is afforded the highest degree of protection from state regulation. (*Perry Ed. Assn.* v. *Perry Local Educators' Assn.* (1983) 460 U.S. 37, 45 (*Perry*).) Streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." (*Hague* v. *C. I. O.* (1939) 307 U.S. 496, 515.) Content-based restrictions on speech uttered in a traditional public forum must be narrowly tailored to achieve a compelling state interest. (*Perry*, *supra*, at p. 45.)

Speech may occur in nonpublic fora as well, but in such cases the government is permitted to place reasonable restrictions on speech, even based on its content. (See *Jones* v. *North Carolina Prisoners' Union* (1977) 433 U.S. 119 [prison]; *Greer* v. *Spock* (1976) 424 U.S. 828 [military base]; *Adderley* v. *Florida* (1966) 385 U.S. 39 [jail].) Thus, speech in nonpublic fora is subject to reasonable time, place and manner restrictions, and "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (*Perry*, *supra*, 460 U.S. at p. 46.)

Not all speech-related activity occurs publicly in traditional public or even nonpublic fora. For most adult Americans, a great deal of time is spent at work. That the speech at issue in this case occurred at plaintiffs' workplace is significant, because the Supreme Court has recognized that speech occurring in the workplace presents special considerations that sometimes permit greater restrictions on First Amendment rights. For example, in *Connick* v. *Myers* (1983) 461 U.S. 138 (*Connick*), an assistant district attorney unhappy with a job transfer circulated a questionnaire in her office, asking her colleagues their opinion about "[the] office transfer policy, office morale, the need for a grievance committee, the level of confidence

in supervisors, and whether employees felt pressured to work in political campaigns." (*Id.* at p. 141, fn. omitted.) The district attorney fired her in part for this speech-related action, but the district court ordered her reinstated. The circuit court of appeals affirmed. The Supreme Court granted certiorari and reversed. The court explained that, with the exception of the question about political campaigns, the plaintiff's speech was not a matter of "public concern" and that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." (*Id.* at p. 146.) Thus, the Supreme Court held the employee's free speech rights could constitutionally be curtailed on the job. (See also *Branti* v. *Finkel* (1980) 445 U.S. 507 [recognizing that for some public jobs, an employer could fire an employee for belonging to a particular political party without violating the employee's First Amendment rights, but holding assistant public defender is not such a job]; but see *Rankin* v. *McPherson* (1987) 483 U.S. 378 (*Rankin*) [violation of clerical employee's First Amendment rights for constable to fire her for expressing opinion, while on the job, that she disagreed with the president's policies and hoped he would be killed]; Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee* (1998) 25 Hastings Const. L.Q. 529, 550-551 [criticizing *Connick* and arguing that *Connick* and *Rankin* "point in different directions"].)

The intersection of an individual's place of employment and his or her free speech rights also appeared in *CSC* v. *Letter Carriers* (1973) 413 U.S. 548 (*Letter Carriers*). In that case, the high court held the Hatch Act (5 U.S.C. former § 7324(a)(2), now see § 7323), which as then written prohibited federal employees from taking active roles in political campaigns for public office, did not violate federal employees' rights under the First Amendment. Although activity in political campaigns is core political speech that would otherwise be entitled to the highest constitutional protection, the court found substantial public policy reasons justified the limitation on employee speech. "[A] judgment [was] made by this country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political

influence of federal employees on others and on the electoral process should be limited." (*Letter Carriers*, *supra*, at p. 557; but see *Bauers* v. *Cornett* (8th Cir. 1989) 865 F.2d 1517, 1523 [explaining that Hatch Act was amended after *Letter Carriers*].) Thus, a strong public policy in avoiding coercing public employees to work on political campaigns justified restrictions on employees' First Amendment rights. (Cf. *Snepp* v. *United States* (1980) 444 U.S. 507 (*per curiam*) [imposition of constructive trust on book profits justified by failure of former Central Intelligence Agency employee, in violation of employment agreement, to obtain preclearance from agency before publishing book based on admittedly unclassified information].)

Thus, in order to vindicate sufficiently weighty public policies governing the workplace, the high court has in the past found the First Amendment rights of employees must sometimes give way. In the cases described above, however, the government directly restricted the speech of public employees. Not so with *NLRB* v. *Gissel Packing Co.* (1969) 395 U.S. 575 (*Gissel*). In that case, a private employer, Sinclair Company, faced a union organizing campaign among its workers. When the president of Sinclair Company first learned of the campaign, he spoke to his employees, attempting to dissuade them from joining a union. He stated that the workers were forgetting the " 'lessons of the past' " when a prior strike had shut down the plant for three months and the plant had then reopened without a union contract; that the company was still on " 'thin ice' " financially; that a strike " 'could lead to the closing of the plant' "; and that because of their age and the limited usefulness of their skills, the workers would not find ready employment if the plant closed. (*Id.* at pp. 587-588.) In the weeks leading up to the election, the company sent each of the workers letters and pamphlets to the same effect. (*Id.* at pp. 588-589.) When the union lost the election, it filed objections to the employer's communications.

As pertinent here, the National Labor Relations Board (NLRB) found Sinclair Company's communications with its workers violated section 8(a)(1) of the National Labor Relations Act, codified at 29 United States Code section 158(a): "It shall be an unfair labor practice for an employer— [¶] (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section

157 of this title." Title 29, United States Code section 158(c) provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." The First Circuit Court of Appeals affirmed the NLRB's ruling.

On certiorari before the Supreme Court, Sinclair Company argued that application of these rules to the speech of its president violated his First Amendment rights. The high court rejected the argument, reasoning that "[a]ny assessment of the precise scope of employer expression, of course, must be made *in the context of its labor relations setting*." (*Gissel*, *supra*, 395 U.S. at p. 617, italics added.) The Supreme Court emphasized that the employer's First Amendment rights must be balanced against "the equal rights of the employees to associate freely," and the court must "take into account the economic dependence of the employees on their employers." (*Ibid.*) In such a setting, said the court, free speech rights in the workplace must be distinguished from speech relating to "the election of legislators or the enactment of legislation . . . where the independent voter may be freer to listen more objectively and employers as a class freer to talk." (*Id.* at pp. 617-618.) In short, because the speech at issue occurred at the workplace, some restrictions on speech could be tolerated that would be impermissible if applied to speech in other settings.

Of course, employees retain First Amendment rights while on the job (*Rankin*, *supra*, 483 U.S. 378; *Branti* v. *Finkel*, *supra*, 445 U.S. 507); *Gissel* did not create a general "workplace exception" to the First Amendment. Still, "in *Gissel* the Supreme Court validated congressional power, under the Commerce Clause, to impose content-based speech restrictions in the workplace to effectuate values embodied in the greater Constitution. The *Gissel* Court's holding, in large part, rested on its understanding of the unique nature of the employment relationship and the potential for even subtle coercion in this context to undermine valid economic policy which promotes constitutional interests." (Sangree, *No Collision in Sight*, *supra*, 47 Rutgers L.Rev. at p. 520; see also Fallon, *Sexual Harassment*, *supra*, 1994 Sup. Ct. Rev. at p. 19 [advocating development of a workplace speech doctrine "responding to

distinctive features of the workplace"]; but see Volokh, *Workplace Harassment*, *supra*, 39 U.C.L.A. L.Rev. at pp. 1820-1822 [reading *Gissel* much more narrowly].)

Thus, *Connick*, *Letter Carriers* and *Gissel* demonstrate the Supreme Court's recognition that strong public policies governing the workplace—both private and public—may justify some limitations on the free speech rights of employers and employees. This view is consistent with the reality that workplaces and job sites are not usually thought of as marketplaces for the testing of political and social ideas (Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment* (1990) 1990 Duke L.J. 375, 423 [suggesting some may view workplace speech as different from political speech generally]), and, therefore, the importance of preserving the workplace as a forum where free speech rights will outweigh other important constitutional considerations is diminished.

C. Employees Are a Captive Audience

In addition to high court authority recognizing free speech limitations at the workplace, another analytical strand that recurs frequently in Supreme Court decisions is relevant here. The Supreme Court has in a number of cases recognized that when an audience has no reasonable way to escape hearing an unwelcome message, greater restrictions on a speaker's freedom of expression may be tolerated. Stated differently, even if the speaker enjoys the right to free speech, he or she has no corollary right to force people to listen.

The relevance of a captive audience to determining the scope of First Amendment protection of speech is exemplified by *Frisby*, *supra*, 487 U.S. 474. In that case, the Supreme Court upheld an ordinance that prohibited focused picketing in front of an individual's home. Although picketing is generally characterized as core political speech (*Carey* v. *Brown* (1980) 447 U.S. 455, 460; *Shuttlesworth* v. *Birmingham* (1969) 394 U.S. 147, 152) and was so in *Frisby* (the resident was targeted because he was a physician who performed abortions), the Supreme Court explained that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." (*Frisby*, *supra*, at p. 487.)

The high court responded to similar concerns in *Bethel School Dist. No. 403* v. *Fraser* (1986) 478 U.S. 675 (*Bethel School*). In *Bethel School*, the high court upheld discipline imposed on a high school student who gave a speech laced with sexual innuendo at a school assembly that many students were required to attend. Although relying largely on the presence of children at the assembly, the high court also stated that school authorities acting in loco parentis "[should] protect children—*especially in a captive audience*—from exposure to sexually explicit, indecent, or lewd speech." (*Id.* at p. 684, italics added.)

That the presence of a captive audience is important in determining the proper degree of First Amendment protection was also discussed in *Rowan* v. *Post Office Dept.* (1970) 397 U.S. 728 (*Rowan*). In *Rowan*, the appellants challenged the constitutionality of a federal law that permitted householders to request their name be removed from mailing lists so they might not receive sexually-themed mailings. The Supreme Court upheld the law, stating: "We . . . categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." (*Id.* at p. 738.)

In addition to *Frisby*, *Bethel School* and *Rowan*, numerous other cases have cited an audience's "captivity" as a factor justifying limitations on free speech. (*FCC* v. *Pacifica Foundation* (1978) 438 U.S. 726, 748-750 (plur. opn.) (*Pacifica*) [possibility that nonconsenting adults might inadvertently tune in to radio broadcast containing indecent speech justified precluding broadcast during the day]; *id.* at p. 759 (conc. opn. of Powell, J.) ["Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away . . . , a different order of values obtains in the home."]; *Erznoznik* v. *City of Jacksonville* (1975) 422 U.S. 205, 209 (*Erznoznik*) [restrictions on speech are justified when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure"]; *id.* at p. 218 (conc. opn. of Douglas, J.) [endorsing

view that "a narrowly drawn ordinance could be utilized within constitutional boundaries to protect the interests of captive audiences"]; *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. at p. 302 (plur. opn.) [recognizing riders of public transit are a captive audience to advertising placed inside the cars]; *id.* at pp. 306-307 (conc. opn. of Douglas, J.) [also recognizing bus riders are a captive audience]; *Cohen* v. *California*, *supra*, 403 U.S. at pp. 21-22 [noting those objecting to the defendant's objectionable message, exhibited on his jacket, could simply avert their eyes].)

The relative captivity of plaintiffs here supports the restriction on defendant Lawrence's speech. Plaintiffs were not present at their job because they wished to hear Lawrence's particular views on their Latino heritage, but neither were they reasonably free to walk away when confronted with his racial slurs. Although plaintiffs could have avoided the undesired speech by quitting their jobs and seeking employment with more racially tolerant supervisors, the cases discussed above indicate the captive audience doctrine is not reserved for situations in which listeners are physically unable to leave, such as passengers on airplanes or inmates in prison. The Constitution does not require plaintiffs to sacrifice their employment to avoid a racially clamorous work environment any more than the doctor in *Frisby*, *supra*, 487 U.S. 474 was required to move from his home, the students in *Bethel School*, *supra*, 478 U.S. 675 were required to leave school, or the passengers in *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. 298 were required to walk home. People need not engage in heroic efforts before we will conclude they have sufficiently averted their eyes and plugged their ears. People need to work; expecting them to walk past someone handing out leaflets on the sidewalk without accepting and reading the flyer is not the same as requiring them to walk off their job to avoid unwanted speech. So long as avoiding unwelcome speech is—as here—sufficiently "impractical" (*Erznoznik*, *supra*, 422 U.S. at p. 209), we can conclude listeners constitute a captive audience, with the result that courts will show greater solicitude for their privacy and their right not to be forced to listen to unwelcome speech.

Most of the cases cited above concededly did not solely concern a captive audience. *Frisby*, *Pacifica* and *Rowan* relied in addition on the increased privacy interest in one's home. (*Frisby*, *supra*, 487 U.S. at pp. 484-485; *Pacifica*, *supra*, 438 U.S. at pp. 731, fn. 2, 748-

749; *Rowan*, *supra*, 397 U.S. at p. 738 [emphasizing "the sanctuary of the home"]; cf. *Wilson* v. *Layne* (1999) ___ U.S. ___, ___ [119 S.Ct. 1692, 1697] ["The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home . . . ."].) *Bethel School* and *Pacifica* relied also on the presence of children. (*Bethel School*, *supra*, 478 U.S. at pp. 683-684; *Pacifica*, *supra*, at pp. 731, fn. 2, 749-750.) *Pacifica*, *Rowan* and *Erznoznik* involved, as well, lewd or indecent speech. (*Pacifica*, *supra*, at pp. 739-740; *Rowan*, *supra*, at p. 730; *Erznoznik*, *supra*, 422 U.S. at p. 207 [ordinance prohibited drive-in theater with screen visible from public street from exhibiting any film portraying nudity].)

The applicability of the captive audience doctrine to harassing speech in the workplace is, moreover, debated by legal commentators. (Compare Volokh, *Workplace Harassment*, *supra*, 39 U.C.L.A. L.Rev. at pp. 1832-1843 [captive audience doctrine should not apply to the workplace], with Sangree, *No Collision in Sight*, *supra*, 47 Rutgers L.Rev. at pp. 515-518 [rejecting Professor Volokh's argument], and Volokh, *How Harassment Law Restricts Free Speech*, *supra*, 47 Rutgers L.Rev. at pp. 571-572 [replying to Professor Sangree]; cf. *Cohen* v. *California*, *supra*, 403 U.S. at p. 21 ["Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense."].) Nevertheless, the Supreme Court authority discussed above firmly establishes, at the least, that the relative captivity of an audience is a relevant and important, if not dispositive, factor in determining whether government restrictions on speech in the workplace are permissible under the First Amendment. Applying that concept here, I find that although defendant Lawrence may desire to offer his apparently low opinion of the Latino workers at his place of employment, plaintiffs apparently do not wish to hear it. Further, plaintiffs were not free to walk away easily from Lawrence's speech, avert their eyes, cover their ears or otherwise avoid hearing his unwanted message. I conclude plaintiffs' status as forced recipients of Lawrence's speech lends support to the conclusion that restrictions on his speech are constitutionally permissible in the circumstances at hand, where the regulation of speech is limited solely to the workplace and the offended recipients constitute a captive audience.

D. The Injunction Here Is Similar to a Time, Place and Manner Regulation

A separate, but related, basis for countenancing an injunction in these circumstances is that an injunction restricting speech that creates a racially hostile work environment is analogous to a permissible time, place and manner restriction on speech. As a general matter, speech in even a traditional public forum may be subject to reasonable time, place and manner restrictions. (*Perry*, *supra*, 460 U.S. at p. 45.) Such restrictions must be content-neutral, serve a significant government interest and "leave open ample alternative channels of communication." (*Ibid.*) In a nonpublic forum, the government may also "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (*Id.* at p. 46.)

Time, place and manner rules generally have been applied to public and nonpublic fora. As a private employer's place of business, defendants' workplace is neither a public nor a nonpublic forum; it is private property. Nevertheless, the Supreme Court has "on at least one occasion applied [the time, place and manner doctrine] to conduct occurring on private property" (*Barnes* v. *Glen Theatre, Inc.* (1991) 501 U.S. 560, 566 (plur. opn.), referring to *Renton* v. *Playtime Theatres, Inc.* (1986) 475 U.S. 41), and adapting to a private workplace the rules applicable to nonpublic fora does not seem inconsistent with the basic goals and purposes of the First Amendment. (See *Robinson* v. *Jacksonville Shipyards, Inc.* (M.D. Fla. 1991) 760 F.Supp. 1486, 1535 ["the regulation of discriminatory speech in the workplace constitutes nothing more than a time, place, and manner regulation of speech"].) Private property is rarely dedicated to the purpose of permitting the unrestrained dissemination of speech; common sense suggests that government restrictions on speech that would be impermissible in public and even nonpublic fora may nevertheless be permissible when applied to certain types of private property.[7]

. Indeed, private employers commonly place any number of restrictions on the speech of their employees, from requiring salespersons to speak well of an employer's products to potential customers and instructing restaurant wait staff not

(continued...)

We begin with the state's interest in restricting workplace speech that creates a racially hostile work environment. The state has announced that it is "the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race . . . ." (Gov. Code, § 12920.) The state recognizes that such discrimination "foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." (*Ibid.*)

Of course, the elimination of racial discrimination, even by private parties or entities, has often been found to be a governmental interest of the highest order. (See, e.g., *Edmonson* v. *Leesville Concrete Co.* (1991) 500 U.S. 614 [exercise of race-based peremptory challenge to juror by private litigant in civil case held unconstitutional]; *Bob Jones University* v. *United States* (1983) 461 U.S. 574 [denial of federal tax benefits for private religious schools with racially discriminatory policy upheld]; *Jones* v. *Mayer Co.* (1968) 392 U.S. 409 [federal statute barring racial discrimination in sale or rental of private property valid under the Thirteenth Amendment]; *Shelley* v. *Kraemer* (1948) 334 U.S. 1 [enforcement of racially restrictive covenant in private property deed unconstitutional].) In short, the State of California has stated a compelling governmental interest in support of its laws aimed at eliminating racially discriminatory practices in private employment.

Restricting Lawrence in the future from engaging in speech that is productive of a racially hostile work environment leaves him ample alternatives for advocating, espousing or simply stating his beliefs. Because I agree with the plurality opinion's affirmance of the Court of Appeal's decision reversing and remanding the case to permit the trial court to "redraft the injunction in a manner that . . . limits its scope to the workplace," a majority of this court agrees the injunction in this case should be limited to speech in the workplace. Lawrence is thus free to speak anywhere and at any time outside of

(continued)
to speak ill of the food they are serving, to requiring employees to keep trade secrets confidential.

his place of employment, whether it be in his home, on the sidewalk, in the park, in his local restaurant or on the Internet.

Madsen v. *Women's Health Center, Inc.* (1994) 512 U.S. 753 (*Madsen*) is illustrative. In that case, protesters picketing an abortion clinic were subject to an injunction that prohibited them from blocking access to the clinic or physically abusing persons entering or leaving it. On finding the injunction to have been violated, the trial court issued a new injunction, providing, inter alia, that demonstrators must (with some exceptions) stay at least 36 feet from clinic driveways and entrances. The demonstrators eventually sought review in the Supreme Court, claiming the new injunction violated their First Amendment rights.

The Supreme Court, although striking down other parts of the injunction, upheld the requirement of a 36-foot buffer zone, finding the limitation was a valid time, place and manner restriction on speech. As pertinent to the question here, the high court noted the "petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone." (*Madsen, supra*, 512 U.S. at p. 764, fn. 2.) If the injunction in the instant case is limited on remand to apply to the workplace only, Lawrence similarly will have open to him ample alternative channels of communication.

The Supreme Court's existing time, place and manner decisions admittedly do not wholly govern this case, for not only does this case not involve a public forum, the injunction here is not content-neutral. "The Supreme Court has stated repeatedly . . . that time, place, and manner regulations must be content neutral in order to receive deferential judicial review." (Fallon, *Sexual Harassment, supra*, 1994 Sup. Ct. Rev. at pp. 16-17, fn. omitted.) "[The] principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.' " (*Madsen, supra*, 512 U.S. at p. 763.) "We thus look to the government's purpose as the threshold consideration." (*Ibid.*)

The state's purpose here is the elimination of racial discrimination and harassment at the workplace. FEHA thus is clearly concerned with the content of harassing speech; hence, the injunction cannot be classified as content-neutral. This fact has led some commentators to conclude that reliance on the time, place and

manner doctrine in the employment harassment setting is misplaced. (Volokh, *Workplace Harassment*, *supra*, 39 U.C.L.A. L.Rev. at pp. 1826-1828; Browne, *Title VII as Censorship*, *supra*, 52 Ohio St. L.J. at p. 521.) As noted at the beginning of this opinion, no Supreme Court decision is directly on point; accordingly, we do not know how that court would balance the diverse interests present here.

Whether the content-based nature of the injunction wholly disqualifies the time, place and manner doctrine from any application to this case need not be decided, however. Instead, it is sufficient to consider components of the doctrine as relevant to the overall assessment of whether the injunction violates defendant Lawrence's First Amendment rights. When those components—a compelling state interest and alternative channels of communication—are considered together with the facts the speech sought to be enjoined occurred in the workplace and the recipients of the unwelcome speech were a captive audience, a strong case for upholding the injunction appears.

We must consider the implications of a contrary holding. The state's interest in eradicating racial discrimination in the workplace is compelling, and the state has made a reasonable determination that such discrimination causes "domestic strife and unrest" and is harmful to "the interest of employees, employers, and the public in general." (Gov. Code, § 12920.) The state's interest is fully applicable to this case, as it is undisputed the speech in question occurred at the workplace where both plaintiffs and defendant Lawrence work. Plaintiffs do not wish to listen to Lawrence's constant stream[8] of verbiage denigrating them on account of their Latino heritage, but they are not free, as a practical matter, to leave their jobs to avoid being the targets of his racial slurs. Lawrence, on

[8] In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature. [Citation.]" (*Fisher* v. *San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610; *Muller* v. *Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 446 [quoting *Fisher*]; see also *Meritor Savings Bank* v. *Vinson* (1986) 477 U.S. 57, 67 [finding sexual harassment on the job must be "sufficiently severe or pervasive" before there can be liability under title VII].)

the other hand, is free to speak his mind anywhere and everywhere, with the sole exception of the workplace.

Diverse interests are in play in this case, and balancing them is undeniably a difficult task. Were we to find the injunction violates Lawrence's First Amendment rights, we would be concluding those rights outweigh the rights of the Latino plaintiffs to be free of unwanted racial discrimination. Like Lawrence's asserted interest in free speech, however, plaintiffs' interest also finds recognition in our federal Constitution (U.S. Const., Amends. XIII, XIV, XV; see *Fitzpatrick* v. *Bitzer* (1976) 427 U.S. 445, 453 & fn. 9 [Congress exercising powers under section 5 of the 14th Amendment when it passed relevant amendments to title VII]). Given the constellation of factors present in this case, no clear reason appears why Lawrence's free speech rights should predominate over the state's and the individual plaintiffs' similarly weighty antidiscrimination interests.

Balancing Lawrence's First Amendment free speech rights with the equally weighty rignt of plaintiffs to be let alone at their jobsite, free of racial discrimination, I find the several factors coalescing in this case—speech occurring in the workplace, an unwilling and captive audience, a compelling state interest in eradicating racial discrimination, and ample alternative speech venues for the speaker—support the conclusion that the injunction, if sufficiently narrowed on remand to apply to the workplace only, will pass constitutional muster.

IV

Having found the injunction, properly narrowed on remand, would not violate the First Amendment, I reach the same result under the California Constitution. Article I, section 2, subdivision (a) of the state Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." We have in the past observed this state constitutional free speech guarantee is "[a] protective provision more definitive and inclusive that the First Amendment" (*Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, 658; see also *Blatty* v. *New York Times Co.* (1986) 42 Cal.3d 1033, 1041) and its plain meaning prohibits prior restraints on speech (*Dailey* v. *Superior Court* (1896) 112 Cal. 94, 100; *Pines* v. *Tomson* (1984) 160

Cal.App.3d 370, 393). Lawrence argues that even if the injunction is permissible under the federal Constitution, it is invalid under this state constitutional provision, which provides greater protection for speech than is afforded by the First Amendment.

Although the First Amendment is written in absolute terms, it has not been so interpreted. The same is true for article I, section 2, subdivision (a) of the state Constitution. As we explained in *Wilson* v. *Superior Court*, *supra*, 13 Cal.3d at pages 661-662: "We do not . . . suggest that prior restraint upon publication can never be justified. The decisions recognize that prior restraints may be imposed under some extraordinary circumstances. For example, it has been said that the government may prohibit the disclosure of military secrets in time of war and prevent the utterance of words that may have the effect of force. [Citation.] Furthermore, an injunction restraining speech may issue in some circumstances to protect private rights (see, e.g., *Magill Bros.* v. *Bldg. Service etc. Union* (1942) 20 Cal.2d 506, 511-512 [127 P.2d 542]) or to prevent deceptive commercial practices (*Securities and Exchange Comn.* v. *Texas Gulf Sulphur Co.* (2d Cir. 1971) 446 F.2d 1301, 1306)." In other words, a sufficiently strong public policy reason can justify a prior restraint on speech even under the heightened protection afforded by the state Constitution.

As with the federal constitutional analysis set forth above, in the state constitutional analysis as well two powerful constitutional interests are at issue. In addition to the protection for one's freedom to "speak, write and publish his or her sentiments on all subjects," the state Constitution—like the Fourteenth Amendment to the federal Constitution—also mandates people not be "denied equal protection of the laws." (Cal. Const., art. I, § 7, subd. (a).) Moreover, just as the state Constitution's free speech guarantee provides greater protection than its federal counterpart, our state charter also provides heightened protection against racial discrimination in the workplace. Article I, section 8 provides "[a] person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of . . . race . . . ." It is thus no answer to observe that free speech rights are greater under the state Constitution, because the same document also grants greater protection against racial discrimination in the workplace. We are once again faced with a difficult balance between competing constitutional values.

The confluence of factors that justifies the limitation on defendant Lawrence's speech under the First Amendment to the United States Constitution supports the same result under the California Constitution. For example, that a potential listener is unable to escape hearing an unwanted message has been cited as a significant factor in the evaluation of free speech rights in this state. In *Braxton* v. *Municipal Court* (1973) 10 Cal.3d 138, this court found that regulation of bullhorns or loud speakers used in demonstrations was "necessary to prevent substantial interference with the work of captive audiences in classrooms and research facilities." (*Id.* at p. 149.) Similarly, in *City of San Jose* v. *Superior Court* (1995) 32 Cal.App.4th 330, the appellate court approved a city ordinance that, in creating a 300-foot buffer zone around the residences of staff members of an abortion clinic, declared " 'targeted picketing activity creates a "captive audience" situation.' " (*Id.* at p. 341.) Clearly an audience's practical ability to avoid unwelcome or unpleasant speech is relevant to evaluating the validity of an injunction under the state Constitution.

Notwithstanding the heightened protection free speech rights enjoy under the state Constitution, time, place and manner restrictions are also recognized under our state charter. (*Robins* v. *Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 910; *Dulaney* v. *Municipal Court* (1974) 11 Cal.3d 77, 85; *Savage* v. *Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1572; *Planned Parenthood* v. *Holy Angels Catholic Church* (N.D.Cal. 1991) 765 F.Supp. 617, 625.) Although the speech here was not uttered in a public forum and the injunction is not content neutral, I find the two remaining factors in the equation—a significant state interest, and ample alternative avenues of communication—are relevant under the state Constitution.

As noted, the California Constitution itself recognizes the importance of eliminating racial discrimination in the workplace. (Cal. Const., art. I, § 8.) Our Legislature has similarly declared such workplace discrimination odious. (Gov. Code, § 12920 [FEHA]; see also, Civ. Code, § 51 ["All persons within the jurisdiction of this state are free and equal, and no matter what their . . . race, . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."].) This court has also observed that the "policy that

promotes the right to seek and hold employment free of prejudice is fundamental." (*Commodore Home Systems, Inc.* v. *Superior Court* (1982) 32 Cal.3d 211, 220.) State law, both statutory and constitutional, thus recognizes a compelling interest in the elimination of racial discrimination in the workplace.

In short, I find defendants' rights under the California Constitution do not compel the conclusion the injunction must be set aside.

V

When we leave our homes, we enter a hurly-burly world where we are sometimes required to endure the unpleasant and undesirable opinions and entreaties of others. Unfortunately, such unwelcome speech sometimes attacks us on the basis of our race, gender or ethnic heritage. (See, e.g., *Brandenburg* v. *Ohio*, *supra*, 395 U.S. 444 [Ku Klux Klan leader made derogatory remarks about African-Americans]; *Contento* v. *Mitchell* (1972) 28 Cal.App.3d 356 [defendant called plaintiff a "bitch" and a "whore"]; *National Socialist Party* v. *Skokie* (1977) 432 U.S. 43 (*per curiam*) [American Nazis wishing to stage parade in predominantly Jewish village].) Ensuring proper breathing room for the airing of diverse views generally requires that we simply close our ears, avert our eyes and move on. The freedom of speech guaranteed by the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." (*United States* v. *Associated Press* (S.D.N.Y. 1943) 52 F.Supp. 362, 372 (opn. of Hand, J.), affd. *sub nom. Associated Press* v. *United States* (1945) 326 U.S. 1.)

The workplace is different from sidewalks and parks, however; workers are not so free to leave to avoid undesired messages. When employees are forced to endure racially harassing speech on the job, it is arguable that "substantial privacy interests are being invaded in an essentially intolerable manner." (*Cohen* v. *California*, *supra*, 403 U.S. at p. 21.) In enacting FEHA and its related provisions, the state has recognized the damage racial discrimination at the workplace can cause, both economically to society and psychologically to the victimized worker. Finally, the restriction on the harasser seems de minimis because he remains free to state his views and opinions in every place other than his place of employment.

No single factor present in this case justifies the restraint on speech here; indeed, another case posing different facts may lead to a different conclusion. However, for all the reasons stated above, I conclude that Lawrence's speech, even if constitutionally protected, may nevertheless be subject to the modest time and place restrictions discussed above, and that an injunction, properly narrowed on remand,[9] will not violate his right to freedom of speech guaranteed to him by both the First Amendment to the United States Constitution and by article I, section 2, subdivision (a) of the California Constitution.

WERDEGAR, J.

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[9] Insofar as the "exemplary list of prohibited derogatory racial or ethnic epithets," which the appellate court directed the trial court to provide, is fashioned in the context of an injunction directed not against individual words per se, but the creation of, or perpetuation of, a racially hostile work environment, I concur in this limitation as well. Such a list should be intended as illustrative and explanatory, rather than prohibiting the mere utterance of specified words regardless of context. In this way, defendants will have additional notice what types of speech are prohibited by the injunction, reducing any potential vagueness that may inhere to an injunction that even partially restricts speech.

DISSENTING OPINION BY MOSK, J.

I dissent.

The plurality conclude that a remedial injunction under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), banning a list of derogatory words from use in the workplace, is a permissible remedy for employment discrimination by defendants John Lawrence and Avis Rent A Car System, Inc. (Avis). I disagree. Among our most cherished constitutional principles is that speech — even if offensive — should be protected unless, and until, it produces a demonstrable harmful effect.

Both the First Amendment of the United States Constitution and article I, section 2, subdivision (a), of the California Constitution restrict the use of content-based prior restraints on speech. The order at issue here — enjoining *any* future use in the workplace of specified words — constitutes just such a prior restraint. It impermissibly restricts speech based on the mere assumption that these words will inevitably create a hostile and abusive work environment amounting to employment discrimination. Nor is this injunction salvaged by labeling it a restraint on *conduct* rather than *speech*.

The plurality's error is particularly glaring because they are deciding this matter in a contextual vacuum, without the benefit of a factual record. They thus overlook the duty of an appellate court, where free speech rights are at stake, to independently review the trial court's findings and the whole record to assure that any injunction is narrowly tailored and justified by compelling necessity. That duty is no less imperative in a matter involving speech in the workplace. As the United States Supreme Court recently emphasized: "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." (*Oncale* v. *Sundowner Offshore Services, Inc.* (1998) __ U.S. __, __ [118 S.Ct. 998, 1003].) Here, we know nothing of the surrounding circumstances. We do not even know what offensive remarks were made, to whom, or when. All we do know is that the parties have agreed that the remarks did *not* amount to "fighting words" — i.e., that the injunction involves otherwise protected speech — and that Lawrence has apparently not made any similarly offensive remarks to Avis employees since 1992.

Like my colleagues, I abhor discrimination in any form. But I feel equally strongly that we cannot use the instrumentality of the courts to penalize speech before we know what was said, to whom, *and with what effect*. It should be obvious that we may not do so in advance, based only on predictions of future harm.

I

The crux of the lead opinion is that the injunction forbidding the use of a list of words does not amount to a prior restraint so long as it was issued after a jury determination of past employment discrimination. It endorses the formulation of amicus curiae American Civil Liberties Union of Northern California that speech was properly enjoined here because "a fair judicial process has determined that a repetitive pattern of speech is unprotected." I am unpersuaded.

"The term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.' [Citation.] Temporary restraining orders and permanent injunctions —*i.e.*, court orders that actually forbid speech activities — are classic examples of prior restraints." (*Alexander* v. *United States* (1993) 509 U.S. 544, 550.) The injunction here falls squarely within that definition. It was not transformed into something acceptable simply because it was issued after a judicial finding of past employment discrimination.

According to the Chief Justice, the injunction passes constitutional muster because it simply precludes defendants from continuing their unlawful activity. It does more than that. It directly targets otherwise protected speech, forbidding *any* future use of a list of offensive words in the workplace — even outside the presence of plaintiffs and even if welcome or overtly permitted. Although the lead opinion insists that it would prohibit an illegal course of *conduct*, in fact it regulates *speech* on the basis of expressive content. (See *De Angelis* v. *El Paso Mun. Police Officers Assn.* (5th Cir. 1995) 51 F.3d 591, 597, fn. 7.)

Moreover, it is not true that any and all future use even of offensive epithets will necessarily amount to a continuation of the same unlawful activity. As the lead opinion concedes, "not every utterance of a racial slur in the workplace violates the FEHA or Title

VII [of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.)]." (Maj. opn., *ante*, at p. 7; see *Fisher* v. *San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608; *Harris* v. *Forklift Systems, Inc.* (1993) 510 U.S. 17, 21 [" '[M]ere utterance of an . . . epithet which engenders offensive feelings in an employee [citation] does not sufficiently affect the conditions of employment to implicate Title VII . . . . Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."].) I am not persuaded that a judicial finding that employees were previously subjected to verbal harassment in violation of FEHA could justify a prior restraint on expression not amounting to "fighting words."[1]

The lead opinion draws analogies to several United States Supreme Court decisions. None is in point.

Thus, the lead opinion relies on several decisions involving limited injunctive remedies against the sale or exhibition of obscene materials, including *Kingsley Books, Inc.* v. *Brown* (1957) 354 U.S. 436, *Times Film Corp.* v. *Chicago* (1961) 365 U.S. 43, *Freedman* v. *Maryland* (1965) 380 U.S. 51, and *Paris Adult Theater I* v. *Slaton* (1973) 413 U.S. 49. Unlike the language at issue here, obscenity is not within the area of constitutionally protected speech. (*Roth* v. *United States* (1957) 354 U.S. 475, 485.)

The lead opinion's analogy to *Pittsburgh Press Co.* v. *Human Rel. Comm'n* (1973) U.S. 376, 413 is also unavailing. There, the United States Supreme Court addressed the constitutionality of a restriction on commercial speech in support of an illegal commercial activity. (*Id.* at pp. 388-389.) Again, the United States Supreme Court emphasized that the order "[did] not endanger arguably

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[1] "Fighting words" — "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" — are not safeguarded by the federal Constitution. (*Chaplinsky* v. *New Hampshire* (1942) 315 U.S. 568, 572.) Significantly, plaintiffs conceded that the offensive speech at issue here did *not* consist of fighting words; the superior court apparently agreed. Nor did the superior court find any "real and immediate threat of future injury" by Lawrence, who had not harassed anyone at Avis since 1992. (See *Los Angeles* v. *Lyons* (1983) 461 U.S. 95, 107, fn. 8 ["The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant."].) In the absence of a record, we have no basis to conclude otherwise.

protected speech" and did not require the court "to speculate as to the effect of the publication" in the future. (*Id.* at p. 390.) *Madsen* v. *Women's Health Center, Inc.* (1994) 512 U.S. 753, also relied on by the majority, is inapposite; unlike the speech at issue in *Madsen*, the speech here is not content-neutral, nor can it be said that the injunction burdens no more speech than necessary, since it forbids *any* use of particular words.[2]

By contrast, the injunction at issue constitutes a broad prohibition touching on *core protected speech*. It applies to words that, although offensive, may be used to convey ideas or emotions and are therefore shielded by the First Amendment. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (*Texas* v. *Johnson* (1989) 491 U.S. 397, 414; *Cohen* v. *California* (1971) 403 U.S. 15, 26 ["[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."].)

Even assuming that the use of derogatory speech can amount to employment discrimination, I disagree that *any future use* even of slurs, vulgarity, or derogatory epithets in the workplace — even by a person who has previously engaged in employment

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[2] *Auburn Police Union* v. *Carpenter* (1st Cir. 1993) 8 F.3d 886, discussed at length by the majority, offers no guidance. In that case, which involved a statute barring solicitation for the benefit of law enforcement officers and organizations, there was no injunction before the court; the First Circuit observed that without the concrete example of a particular injunction, it could not determine whether the prior restraint doctrine had been violated. (*Id.* at p. 904.) The majority also summarily cite several federal and state law cases upholding injunctions; with a single exception (*Robinson* v. *Jacksonville Shipyards, Inc.* (M.D.Fla. 1991) 760 F.Supp. 1486), none involves a comparable injunction against otherwise protected speech in the workplace. Significantly, *Robinson* has been widely criticized. (See, e.g., Volokh, *Freedom of Speech and Workplace Harassment* (1992) 39 UCLA L.Rev. 1791, 1818 ["Thus, in the recent case of [*Robinson*], the district court was wrong . . . ."]; Karner, *Political Speech, Sexual Harassment, and a Captive Workforce* (1995) 83 Cal.L.Rev. 637, 665, fn. 168 ["[T]he *Robinson* court ignored basic [First Amendment] doctrine in reaching this conclusion."].) Nor do any of the cases cited by the majority analyze the question in light of article I, section 2, subdivision (a), of the California Constitution, which, as discussed below, affords broader protection against prior restraints on speech.

discrimination — can constitutionally be proscribed. That is because the offensive content *and effect* of using any one, or more, of a list of *verboten* words cannot be determined in advance: "The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. Thus, the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say. Similarly, it is the content of the utterance that determines whether it is a protected epithet or an unprotected 'fighting comment.' " (*Young* v. *American Mini Theatres* (1976) 427 U.S. 50, 66, fn. omitted.) For this reason, I would hold that the injunction fails to overcome the heavy presumption against the constitutional validity of prior restraints on speech. (*Vance* v. *Universal Amusement Co.* (1980) 445 U.S. 308, 317; *Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, 657.)[3]

II

But we need look no farther than article I, section 2, subdivision (a), of the California Constitution to resolve this matter: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for abuse of this right. A law may not

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[3] I am also unpersuaded by the concurring opinion's attempt to create an exception to the the prohibition against prior restraints in the case of workplace discrimination using "strands of analysis" from United States Supreme Court precedents. The logic of the concurring opinion unravels upon closer scrutiny. Thus, *R.A.V.* v. *St. Paul* (1992) 505 U.S. 377 does not, as the concurring opinion asserts, state or imply that any use of derogatory speech in the workplace is unprotected or that a content-based prior restraint such as the one at issue here would pass constitutional muster; nor do the high court's decisions suggest that the workplace may be regarded as a public forum or employees a "captive audience." The concurring opinion's analysis under the California Constitution is equally unpersuasive. Again, in the absence of any sound constitutional basis for exempting this injunction from the restriction against prior restraints, the concurring opinion ignores our precedents in point and, instead, hopelessly attempts to construct a coherent theory from random "strands" of doctrine taken from cases about equal protection, captive audiences, time, place, and manner restrictions, and racial discrimination. Our goal must be to construe constitutional provisions with careful regard to precedent; otherwise the public has little assurance that the court's decisions will not be influenced by its members' personal policy views. (See *People* v. *Jefferson* (Aug. 2, 1999, S057834) __ Cal.4th __, __ [dis. opn. of Werdegar, J., at pp. 2-3.].)

restrain or abridge liberty of speech or press." As explained in the majority opinion I authored in *Wilson* v. *Superior Court*, *supra*, 13 Cal.3d at page 658: "A protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press."

Article I, section 2, subdivision (a), plainly permits holding Lawrence and Avis responsible for abuse of the right, but not censorship by way of a prior restraint. "The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. . . . It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility." (*Dailey* v. *Superior Court* (1896) 112 Cal. 94, 97; *Pines* v. *Tomson* (1984) 160 Cal.App.3d 370, 393 ["Although the section does not use the term 'prior restraint,' the plain meaning of the first sentence of article I, section 2, subdivision (a) is that 'sentiments' are protected from any prepublication sanctions, i.e., from all prior restraints."].)

As the dissenting opinion in the Court of Appeal below correctly observed: "Punishment for and suppression of speech are two very different things. . . . No California appellate court has ever held . . . that persons can be subjected to prior restraint on speech, and legally forbidden to speak on pain of fine or being sent to jail, for merely making rude or even immoral comments that might have a bad effect on the listener."

The lead opinion's attempt to construe *Dailey* — and the California Constitution — narrowly on this point fails. Thus, it relies on *People ex rel. Busch* v. *Projection Room Theatre* (1976) 17 Cal.3d 42, 57, which upheld the constitutionality of an action to abate the sale or display of obscene material as a public nuisance. As I stated at the time, in my view the decision in *Busch* was incorrect; the public nuisance proceedings at issue failed to pass constitutional muster. (See *id.*, at p. 62 (conc. & dis. opn. by Mosk, J.) ["[S]uch proceedings . . . offend article I, section 2, of the California Constitution which prohibits action that may 'restrain or abridge liberty of speech or press.' "]; see also *id.*, at pp. 63-74 (dis. opn. by Tobriner, J.).) It is also distinguishable: it involved exhibition of specific magazines and films adjudged to be obscene,

i.e., to constitute unprotected expression. Nor did the majority therein purport to apply, or even cite, article I, section 2, subdivision (a).

The lead opinion also relies on *Goldin* v. *Public Utilities Commission* (1979) 23 Cal.3d 638, which, like *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, *supra*, 413 U.S. 376, involved restrictions on commercial speech related to illegal activity — using the telephone to solicit acts of prostitution. The activity was found not to involve protected speech within the meaning of the First Amendment. On those grounds, *Goldin*, too, is distinguishable. Nor, again, did the majority in *Goldin* even address the free speech protections under article I, section 2, subdivision (a).

Finally, the lead opinion cites *People* ex rel. *Gallo* v. *Acuna* (1997) 14 Cal.4th 1090, which upheld the validity of an injunction restraining future activities of gang members under the common law nuisance laws. I continue to believe that *Gallo* was wrongly decided. (See *id.*, at pp. 1132-1148 (dis. opn. by Mosk, J.).) But, in any event, it is unilluminating: the majority in *Gallo* did not address any question involving prior restraints on speech; nor did *Gallo* involve any application whatsoever of article I, section 2.[4]

The plurality express a concern that unless an injunction issues in this matter, plaintiffs will be confined to bringing repetitive lawsuits. I hope that would not result. However, a mere policy consideration is of little weight in light of the strong presumption against prior restraints.

In any event, I disagree that the threat of repetitive litigation would be less effective in terms of avoiding future workplace

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[4] The First Amendment issue addressed in *Gallo* involved not free speech, as the majority here erroneously suggest, but freedom of association, i.e., an injunction against "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant" or any other gang member. (See *People* ex rel. *Gallo* v. *Acuna*, *supra*, 14 Cal.4th at p. 1110.) The underlying injunction issued by the superior court in *Gallo* also prohibited the use of words, phrases, physical gestures, or symbols, or engaging in other forms of communication that described the gang; it also forbade the wearing of clothing bearing the name or letters of the gang. (See *id.*, at p. 1136, fn. 3 (dis. opn. by Mosk, J.) [quoting injunction].) Those provisions of the injunction, however, were stricken as unconstitutional by the Court of Appeal, and its holding on this point was not challenged on review by this court.

discrimination by Avis than the possibility that an individual supervisor will be jailed for contempt. As the damages action in this matter demonstrates, speech may be subject to strong sanctions under FEHA if it amounts to employment discrimination. Faced with the high costs of defending against such suits — including compensatory damages, attorney fees, and punitive damages — employers like Avis are likely to regard it as a potent remedy indeed.

III

For the foregoing reasons, I would reverse the judgment of the Court of Appeal.

Mosk, J.

DISSENTING OPINION BY KENNARD, J

I dissent.

Constitutional free speech guarantees are in undeniable tension, if not conflict, with the statutory rights of employees to be free from discriminatory verbal harassment that creates a hostile work environment. Although this tension has generated lively debate in scholarly legal journals, the United States Supreme Court has yet to address the issue. This case presents one aspect of the problem: the use of injunctions prohibiting certain kinds of future speech, on the basis of its content, as a remedy for hostile environment employment discrimination.

As I will explain, the particular content-based injunction at issue here, both as drafted by the trial court and as modified by the Court of Appeal, is invalid under the free speech guarantees of both the federal and state Constitutions because the record fails to establish that an injunction restricting future speech is necessary to prevent a recurrence of the wrongful acts of employment discrimination. Moreover, even assuming a need for some content-based speech restriction could be shown, the injunction here is invalid because it is not narrowly drawn to target only the prohibited discrimination.

These defects are not curable. In particular, the Court of Appeal's proposal to amend the injunction by adding a list of forbidden "bad words" will not make the injunction any less an abridgment of the right of free speech. Indeed, I question whether *any* injunction prohibiting workplace expression of particular views, however abhorrent those views, can be reconciled with constitutional free speech guarantees: "[U]nder our system of government we may not prohibit the dissemination of views simply because they are controversial, distasteful, or disturbing. To sanction such a prohibition 'would be a complete repudiation of the philosophy of the Bill of Rights.' [Citation.]" (*Planned Parenthood Shasta-Diablo, Inc.* v. *Williams* (1995) 10 Cal.4th 1009, 1027 (dis. opn. of Kennard, J.).)

I

Seventeen employees brought this action claiming employment discrimination in violation of the state Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). They named as

defendants their common employer, Avis Rent A Car System, Inc. (Avis), and 10 Avis employees, one of whom was John Lawrence. Of relevance to the issue raised here, plaintiffs alleged that Avis had employed them as drivers and that Lawrence, who was assigned to Avis's service station at the San Francisco International Airport, created a hostile work environment by verbally harassing and demeaning them "on the basis of their race, national origin and lack of English language skills." They also alleged that Kathy Black, an Avis supervisor, had conducted a discriminatory investigation of an alleged theft.

For reasons not disclosed by the appellate record, the case proceeded to trial as to only 12 of the 17 plaintiffs. By special verdicts, the jury found that Lawrence had unlawfully harassed and discriminated against four of these plaintiffs, three of whom Black had also discriminated against. With respect to three of these four plaintiffs, the jury found that Avis knew or should have known of Lawrence's conduct and failed to stop it. The jury awarded $25,000 in emotional distress damages to each of the three plaintiffs against whom both Lawrence and Black had discriminated, but it awarded no damages to the plaintiff against whom Lawrence alone had discriminated.

After the jury returned these special verdicts, the trial court decided to grant injunctive relief. Interpreting the special verdicts as findings that Lawrence had "engaged in acts of harassment so continual and severe as to alter the working conditions" for the four plaintiffs, the court found "a substantial likelihood based on his actions that he will do so in the future unless restrained." Referring to Lawrence, the court said that "[i]f he has done it four times against four Latinos, there is a substantial likelihood that he will do it again . . . ." But neither the plaintiff nor the court disputed the representations of defendants' attorney that only one of the plaintiffs still worked for Avis in San Francisco and that Lawrence had not engaged in any harassment during the pendency of the lawsuit. Defendants Avis and Lawrence objected that the proposed injunction was an unconstitutional abridgment of their free speech rights, but the court overruled these objections.

The trial court found that Lawrence's discriminatory acts had consisted of offensive touching and the utterance of derogatory racial or ethnic epithets. As here relevant, the trial court granted a

permanent injunction prohibiting Lawrence "from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of [Avis]" and also "from any uninvited intentional touching of said Hispanic/Latino employees, as long as he is employed by [Avis] in California." The injunction prohibited Avis from "allowing defendant John Lawrence to commit any [such] acts . . . under circumstances in which it knew or should have known of such acts . . . ."

Lawrence and Avis appealed from the portion of the judgment granting the permanent injunction. The Court of Appeal found the injunction overbroad insofar as it restricted Lawrence's activities other than at the workplace, and it found the injunction vague in its prohibition against "derogatory racial or ethnic epithets." To cure these defects, the Court of Appeal reversed and remanded to permit the trial court to redraft the injunction to limit its scope to the workplace and to add "an exemplary list of prohibited derogatory racial or ethnic epithets, specifying epithets such as those actually used in the workplace by Lawrence."

To determine whether the injunction, even as limited by the Court of Appeal, is an unconstitutional abridgment of constitutional free speech rights, this court granted the petition for review filed by defendants Avis and Lawrence.

II

The First Amendment to the federal Constitution, made applicable to the states by the Fourteenth Amendment (*Near* v. *Minnesota* (1931) 283 U.S. 697, 732), declares that "Congress shall make no law . . . abridging the freedom of speech . . . ." This First Amendment free speech guarantee restricts not only the power of legislatures to enact laws of general applicability but also the authority of courts to issue injunctions as remedies for violations or threatened violations of a legislative or judicial decree. (*Madsen* v. *Women's Health Center, Inc.* (1994) 512 U.S. 753, 764.) Indeed, because injunctions "carry greater risks of censorship and discriminatory application than do general ordinances," the United States Supreme Court requires "a somewhat more stringent application of general First Amendment principles" to injunctions restricting speech. (*Id.* at pp. 764–765.)

An injunction that regulates speech on the basis of its topic is termed a content-based regulation and is presumptively invalid. (*Rosenberger* v. *Rector and Visitors of Univ. of Va.* (1995) 515 U.S. 819, 828; *R.A.V.* v. *St. Paul* (1992) 505 U.S. 377, 382.) An injunction that regulates speech on the basis of the particular views or biases that the speaker expresses about a topic is termed a viewpoint regulation and is likewise presumptively invalid, because the United States Supreme Court regards viewpoint discrimination as "an egregious form of content discrimination." (*Rosenberger* v. *Rector and Visitors of Univ. of Va., supra,* at p. 829.)

An injunction that regulates speech on the basis of its content or viewpoint is scrutinized more strictly than a content neutral injunction. (*Madsen* v. *Women's Health Center, Inc., supra,* 512 U.S. 753, 762–763.) If an injunction is based on content or viewpoint, the proponent ordinarily must show both that the injunction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." (*Perry Ed. Assn.* v. *Perry Local Educators' Assn.* (1983) 460 U.S. 37, 45; see *Madsen* v. *Women's Health Center, Inc, supra,* at pp. 763–764.)

The injunction at issue here is based on both content and viewpoint. It is based on content because it prohibits speech for its communicative impact — its potential to offend the person who hears it. (*Reno* v. *American Civil Liberties Union* (1997) 521 U.S. 844, 867–868 [117 S.Ct. 2329, 2342–2343]; *Forsyth County* v. *Nationalist Movement* (1992) 505 U.S. 123, 134; *Texas* v. *Johnson* (1989) 491 U.S. 397, 411–412.) It is based on viewpoint because it prohibits the utterance of "derogatory racial or ethnic epithets," words that convey and embody a particular bias. (*R.A.V.* v. *St. Paul, supra,* 505 U.S. 377, 391–393 [state may not prohibit only those fighting words expressing a viewpoint of racial intolerance].)

The state may prohibit racial or ethnic *discrimination* in housing and employment. Indeed, it has a compelling interest in doing so. (See *R.A.V.* v. *St. Paul, supra,* 505 U.S. 377, 395; *Walnut Creek Manor* v. *Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 273 (dis. opn. of Kennard, J.).) Although the state may adopt various means to combat racial and ethnic bias in general, antidiscrimination measures collide with the First Amendment when they attempt to combat racial and ethnic bias by "silencing speech on the basis of its content" (*R.A.V.* v. *St. Paul, supra,* 505 U.S. 377, 392) or by

"handicap[ping] the expression of particular ideas" (*id.* at p. 394). The proper test to determine the validity of the content- and viewpoint-based injunction at issue here is whether its restriction on speech is necessary to serve a compelling state interest and narrowly drawn to achieve that end. (*Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, *supra*, 460 U.S. 37, 45.)

The state has a compelling interest in eradicating invidious employment discrimination (see *R.A.V.* v. *St. Paul*, *supra*, 505 U.S. 377, 395), and the injunction here surely *promotes* that interest (see *ibid.*), but plaintiffs have not shown that the injunction here is *necessary* to serve that interest. An award of damages for proven employment discrimination is a presumptively adequate and content neutral alternative, particularly for a first time offender. So far as the record shows,[5] this is the first case in which damages have been awarded against Lawrence or Avis for employment discrimination. Only one Avis employee, Lawrence, was found to have caused an abusive work environment by using racial or ethnic slurs, and he did so as to only four of the original seventeen plaintiffs. The harassment was confined to a limited time period and ceased after plaintiffs filed this lawsuit. Thus, there is no basis upon which to conclude that damages will not have the desired deterrent effect. (See *Intern. Soc. for Krishna Consciousness* v. *Eaves* (5th Cir. 1979) 601 F.2d 809, 833 [rejecting the view that a speech restraint may be based on the generalization that one who has violated a law once is likely to do so again].) The trial court's assertion that an injunction is necessary is entirely speculative.

Even assuming for the sake of argument that injunctive relief were necessary, the record does not demonstrate the necessity of an injunction restricting speech. The trial court found that Lawrence's harassment had consisted of both offensive touching and the use of racial and ethnic epithets. The jury's special verdicts do not specify whether the employment discrimination findings were based on the offensive touching, the epithets, or a combination of the two. The

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[5] I disagree with the majority that the appellate record, which includes the pleadings, the jury's special verdicts, and all postverdict proceedings relating to issuance of the injunction, is inadequate to determine the constitutionality of the injunction or requires this court to indulge in presumptions, belied by the record before us, that the injunction is necessary and narrowly tailored.

record contains no finding by the jury or by the trial court that the utterance of epithets alone created a hostile work environment for any Avis employee. Lawrence and Avis do not challenge the portion of the injunction prohibiting uninvited intentional touching. Nothing in the record shows that enforcement of this portion of the injunction, and the portion of the injunction concerning the non-speech activities of Avis supervisor Kathy Black, will not be effective to prevent a recurrence of the hostile environment employment discrimination.

Nor is the injunction narrowly drawn to prevent a recurrence of a hostile work environment for plaintiffs. For First Amendment purposes, a regulation is narrowly drawn "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." (*Frisby* v. *Schultz* (1988) 487 U.S. 474, 485.) "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." (*Ibid.*)

Here, the injunction prohibits Lawrence from addressing epithets to *any* Hispanic employee, not just the four plaintiffs (only one of whom still works for Avis) whom Lawrence was found to have harassed. This is not a class action, a criminal prosecution, or a civil enforcement action by government; it is a civil action by individual private plaintiffs. I am aware of no authority permitting a trial court, in a civil action by individual plaintiffs, to award equitable relief in favor of persons who are strangers to the proceeding.

Also, the injunction prohibits Lawrence not only from addressing racial and ethnic epithets to Hispanic employees, but also from using those epithets as descriptive of these employees. The latter prohibition, because it applies even to statements made outside the hearing and knowledge of any Hispanic employee, encompasses speech unlikely to contribute in any way to a hostile work environment for plaintiffs. Thus, the injunction is an invalid infringement of free speech rights because it prohibits expressive activity that is not the precisely targeted evil of employment discrimination against plaintiffs.

Even if the injunction were narrowed to prohibit Lawrence only from directing epithets at the workplace to the particular Avis employees he previously harassed, it would still prohibit more speech than necessary. As the Chief Justice concedes, "not every utterance of a racial slur in the workplace violates the FEHA." (Plur.

opn., *ante*, at p. 8.) An isolated use of an epithet, however odious, does not produce a hostile work environment. To establish employment discrimination by verbal harassment, the employee must show that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . .' " (*Harris* v. *Forklift Systems, Inc.* (1993) 510 U.S. 17, 21 [enunciating this standard for hostile environment employment discrimination under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.)]; *Fisher* v. *San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [adopting same standard for claims under FEHA].) An injunction prohibiting *every* utterance of a racial or ethnic insult in the workplace, not just utterances that actually produce a hostile work environment, is not narrowly drawn to serve the state's compelling interest in eliminating employment discrimination.

"[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." (*Harris* v. *Forklift Systems, Inc., supra,* 510 U.S. 17, 23.) For this reason, I question whether any injunction prohibiting specifically identified speech, without regard to its frequency, its context, or its effect on any employee, could survive the strict scrutiny the First Amendment requires for injunctions restricting speech on the basis of content and viewpoint.

Also, as Justice Mosk points out in his dissent, a content-based injunction restricting workplace speech would appear necessarily and invariably to be an invalid prior restraint. "The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.' . . . [P]ermanent injunctions — i.e., court orders that actually forbid speech activities — are classic examples of prior restraints." (*Alexander* v. *United States* (1993) 509 U.S. 544, 550.) The injunction at issue here certainly fits this definition of a prior restraint.

The First Amendment "accords greater protection against prior restraints than it does against subsequent punishment for a particular speech." (*Nebraska Press Assn.* v. *Stuart* (1976) 427 U.S. 539, 589 (conc. opn. of Brennan, J.).) The particular disfavor for prior restraints is based on "a theory deeply etched in our law: a free

society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." (*Southeastern Promotions, Ltd.* v. *Conrad* (1975) 420 U.S. 546, 559, italics in original.) Although not invalid per se, prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." (*Nebraska Press Assn.* v. *Stuart, supra,* 427 U.S. 539, 559.)

A prior restraint is subject to a "heavy presumption against its constitutional validity." (*Bantam Books, Inc.* v. *Sullivan* (1963) 372 U.S. 58, 70.) Anyone seeking to defend a prior restraint "thus carries a heavy burden of showing justification for the imposition of such a restraint." (*Organization for a Better Austin* v. *Keefe* (1971) 402 U.S. 415, 419.) Although the United States Supreme Court has not stated precisely what this "heavy burden" entails, it apparently includes at least a showing that the prohibited speech is "overwhelmingly likely" to be subject to regulation without violating the First Amendment (*Intern. Soc. for Krishna Consciousness* v. *Eaves* (5th Cir. 1979) 601 F.2d 809, 833) and that it will "surely result in direct, immediate, and irreparable damage" (*New York Times Co.* v. *United States* (1971) 403 U.S. 713, 730 (conc. opn. of Stewart, J.); see also Tribe, American Constitutional Law (2d ed. 1988) § 12-36, pp. 1045–1051).

Because isolated remarks seldom, if ever, cause a hostile work environment, and because determining the existence of a hostile work environment requires an examination of all relevant circumstances, it is impossible to demonstrate in advance that any particular workplace speech will create a hostile work environment (and thus potentially be subject to regulation without violating the First Amendment), much less that it will produce direct, immediate, and irreparable injury. Accordingly, the conclusion seems inescapable that injunctions prohibiting any future offensive workplace speech on the basis of content and viewpoint are invariably and necessarily unconstitutional prior restraints on speech.

III

The Chief Justice's plurality opinion does not treat the injunction at issue here as a prior restraint, nor does it apply the strict test that the United States Supreme Court has mandated for content- and viewpoint-based injunctions. It suggests various reasons why a less rigorous test is appropriate, and plaintiffs and amici curiae offer other reasons. I consider these reasons in turn.

Preliminarily, I note that an otherwise content neutral statute or injunction may prohibit speech falling within certain narrowly defined categories — such as obscenity, defamation, and "fighting words" — without meeting any separate compelling interest test. (See *Chaplinsky* v. *New Hampshire* (1942) 315 U.S. 568, 572.) The "fighting words" category is quite narrow (see *Gooding* v. *Wilson* (1972) 405 U.S. 518), however, and it is conceded that the speech at issue here is outside this category. Nor is any contention advanced that the speech at issue here may be prohibited as obscene or defamatory. Also, for purposes of deciding what First Amendment test to apply, it makes no difference that a content-based injunction prohibits speech at only one location, here the workplace. (See *Reno* v. *American Civil Liberties Union, supra,* 521 U.S. 844, 880 [117 S.Ct. 2329, 2349] [" 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place' "]; *Consolidated Edison Co.* v. *Public Serv. Comm'n* (1980) 447 U.S. 530, 541, fn. 10 ['we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternate means of expression"].)

Under what some commentators have termed the "captive audience doctrine," the United States Supreme Court in a few instances has acknowledged the legitimate interests of persons who would prefer to avoid exposure to unwelcome speech but are unable to do so. (See, e.g., *Frisby* v. *Schultz, supra,* 487 U.S. 474, 487; *Lehman* v. *City of Shaker Heights* (1974) 418 U.S. 298.) Plaintiffs here argue that because employees are generally unable to avoid exposure to the offensive workplace speech of coworkers and supervisors, a court should be permitted to enjoin all offensive discriminatory speech, regardless of its effect on any particular employee, at any workplace where hostile environment employment discrimination has been demonstrated.

This argument reads more into the captive audience doctrine than the decisions of the United States Supreme Court permit. Under those decisions, a court may impose a content-based restriction to protect unwilling listeners from offensive speech only in the "narrow circumstances" where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure" and " 'substantial privacy interests are being invaded in an essentially intolerable manner.' " (*Erznoznik* v. *City of Jacksonville* (1975) 422 U.S. 205, 209–210.) Even when listener "captivity" is demonstrated, a court may not prohibit all insulting, disturbing, or offensive speech, but only speech that invades a substantial interest in an intolerable manner. An employee surely has a substantial interest in a work environment that is not hostile or abusive, but this interest is invaded in an intolerable manner only when harassing speech actually produces a hostile or abusive environment. Because the injunction here prohibits even isolated use of racial and ethnic slurs having no demonstrable effect on any plaintiff, it cannot be saved by invoking the captive audience doctrine.

Moreover, in one important respect the work environment is different from other captive audience situations that the United States Supreme Court has considered: While it is true that during working hours an employee is not free to go elsewhere to avoid hearing a coworker's offensive speech, it is equally true that the coworker is not free to go elsewhere to express his or her views. Although the United States Supreme Court has upheld content neutral prohibitions on residential picketing (see *Frisby* v. *Schultz, supra,* 487 U.S. 474, 487 [upholding ordinance regulating residential picketing]; but see also *Carey* v. *Brown* (1980) 447 U.S. 455, 470–471 [striking down content-based residential picketing ordinance]), it has never applied the captive audience doctrine to, for example, a content-based regulation prohibiting homeowners from posting signs offensive to their neighbors, such as the ordinance at issue in *R.A.V.* v. *St. Paul, supra,* 505 U.S. 377. (See also *City of Ladue* v. *Gilleo* (1994) 512 U.S. 43 [holding that ordinance banning almost all residential signs violated First Amendment].) If the captive audience doctrine has any application to the work environment, it must be applied in a manner that acknowledges and accommodates the legitimate rights of both the captive speaker and the captive listener. (See Strauss, *Redefining the Captive Audience Doctrine* (1991) 19 Hastings Const.L.Q. 85, 116–119 [suggesting

consideration of three factors: the extent of the listener's "captivity," the seriousness of the threatened harm to the unwilling listener, and the degree to which restrictions burden the speaker's legitimate First Amendment interests].) A blanket prohibition on offensive epithets, regardless of the effect on any listener, surely gives insufficient consideration to the legitimate speech interests of the captive speaker.

In a footnote containing its only reference to this dissent, the Chief Justice's plurality opinion cites two federal appellate decisions for the proposition "when a repeated course of conduct has been found to constitute a nuisance or unlawful employment practice, a court is authorized to enjoin future individual acts that are likely to continue or perpetuate the nuisance or unlawful practice." (Plur. opn., *ante*, at p. 31, fn. 9.) But neither of the cited decisions addresses any issue under the First Amendment. (See *People* v. *Scheid* (1997) 16 Cal.4th 1, 17 [an appellate opinion is not authority on issues not considered].) I agree that when free speech concerns are *not* implicated, courts have broad equitable powers to issue injunctions to halt proven patterns of illegal activity. For this reason, I do not question the portion of the injunction here prohibiting Lawrence from engaging in offensive touching, because this portion of the injunction does not restrict speech. But the portion of the injunction prohibiting Lawrence from using offensive epithets *does* restrict speech, and it does so on the basis of content and viewpoint. As I have explained, the First Amendment, as authoritatively construed by the United States Supreme Court, treats such injunctions as presumptively invalid and requires courts to subject them to an exacting form of scrutiny that this injunction cannot withstand.

Insofar as he deigns to consider the First Amendment at all, the Chief Justice may be understood to argue that once a court has fully and fairly determined that a person has engaged in speech that contributed to a hostile work environment for a particular employee, a court may, without violating the First Amendment, prohibit that person not only from causing the same harm to the same employee by the same speech, but also from engaging in any similar speech that *might* cause similar harm to any similar employee. The Chief Justice suggests that an injunction is not an invalid prior restraint if it is remedial in this sense.

Isolated remarks by individual justices of the United States Supreme Court suggest there may be some sort of "remedial injunction" exception to the general prohibition against prior restraints. (See, e.g., *Madsen* v. *Women's Health Center, Inc., supra,* 512 U.S. 753, 778–779 (conc. opn. of Souter, J.); but see also *id.* at p. 794, fn. 1 (conc. and dis. opn. of Scalia, J.) [questioning whether judicial abridgment of First Amendment rights may be imposed as a sanction for misconduct].) But the high court's decisions do not support the broad proposition that viewpoint-based remedial injunctions are exempt from strict First Amendment scrutiny simply because they are issued against a person who has once been found to have engaged in speech that produced or contributed to a hostile work environment.

The Chief Justice here seems to rely in particular on *Pittsburgh Press Co.* v. *Human Rel. Comm'n* (1973) 413 U.S. 376, in which the high court upheld an injunction prohibiting commercial speech proposing unlawful commercial transactions. A newspaper had segregated its "help wanted" classified advertisements into separate columns for men's jobs and women's jobs. The injunction prohibited this practice as violating a local antidiscrimination ordinance. Rejecting a claim that the injunction was an invalid prior restraint on speech, the court reasoned that the ordinance prohibiting segregation of employment advertisements on the basis of sex was itself a valid prohibition of sexual discrimination, that the injunction went into effect only after a full and final determination that the newspaper had violated the ordinance, and that the injunction did no more than prohibit the very conduct determined to be unlawful. (*Id.* at pp. 389–390.) Because the injunction's prohibition extended only to commercial speech already determined to be unprotected by the First Amendment, and because this determination did not turn on the publication's actual effect on particular jobseekers, the court observed that "this is not a case in which the Court is asked to speculate as to the effect of publication." (*Id.* at p. 390.)

Here, by contrast, the speech at issue is *not* commercial speech, and the determination of employment discrimination *does* turn on the *effect* of the prohibited speech on particular employees, because racial and ethnic slurs in the workplace cause employment discrimination only if they have the *effect* of producing a hostile work environment, which in turn depends upon, among other things,

the subjective emotional impact of the speech on the employees claiming discrimination. Because a finding of hostile environment discrimination turns on the effect of particular speech, and because this court cannot know in advance what effect future speech will have, this court *is* asked to speculate as to the effect of the expression that the injunction prohibits.

To take a different example, if a newspaper has maliciously published a defamatory statement about a public figure, as determined by a jury after a full and fair trial, some (but not all) courts would permit issuance of an injunction prohibiting the newspaper from again publishing the very same defamatory statement. (See *Kramer* v. *Thompson* (3d Cir. 1991) 947 F.2d 666, 675–676 [discussing various appellate decisions on this point].) To my knowledge, however, no court has ever so much as suggested that in this situation a court could enjoin the newspaper from publishing other derogatory statements about the same public figure, on the theory that these statements *might* prove to be defamatory and their prohibition would serve a remedial purpose.

To take another example that the high court has specifically addressed, once a movie theater has shown a film that is obscene, as determined by a jury following a full and fair trial, a trial court may thereafter enjoin the theater from exhibiting that film (*Paris Adult Theatre I* v. *Slaton* (1973) 413 U.S. 49, 54–55), but it may *not* enjoin the theater from exhibiting other films based on a court's preliminary determinations that they *might* be obscene. (*Vance* v. *Universal Amusement Co.* (1980) 445 U.S. 308, 311.) Rather, a final adjudication of obscenity is required before a court may enjoin exhibition of a film.

Speech having only the potential to cause hostile environment employment discrimination deserves at least as much protection as speech that is potentially obscene or defamatory, two types of speech that are categorically proscribable under the First Amendment. An employer who has engaged in or permitted discriminatory verbal harassment that produced a hostile work environment, as determined by a jury following a full and fair trial, may not thereafter be enjoined from engaging in or permitting similar offensive speech on the theory that it *might* again produce a hostile work environment. Any injunction that restricts speech on the basis of viewpoint, even one issued to remedy past discrimination and to prevent its

recurrence, must narrowly target the evil of employment discrimination and not prohibit more speech than necessary.

IV

Article I, section 2, of the California Constitution declares: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." I agree with Justice Mosk that, for the reasons cogently stated in part II of his dissenting opinion, the injunction at issue here violates our state constitutional free speech guarantee, which is "more definitive and inclusive" than the federal provision. (*Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, 658.)

V

Employees expect and deserve effective protection against invidious discrimination at work. Federal and state statutes provide this protection. But when the alleged discrimination consists of verbal harassment by a coworker, the statutory right to equal employment opportunity comes into conflict with constitutional free speech guarantees. Employees do not surrender constitutional free speech rights when they go to work. "[T]o wholly exclude workplace speech from the realm of the First Amendment would immeasurably impoverish the freedom of expression in this society. For many people, there is no other time or place in their lives in which they can talk about public issues, personal problems, and spiritual concerns with individuals from diverse backgrounds and perspectives." (Estlund, *The Architecture of the First Amendment and the Case of Workplace Harassment* (1997) 72 Notre Dame L.Rev. 1361, 1375; see also Comment, *Political Speech, Sexual Harassment, and a Captive Workforce* (1995) 83 Cal. L.Rev. 637, 646 ["it is arguable that today more political speech occurs at the workplace than in the public square"].) And, as Justice Holmes reminds us, "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." (*Abrams* v. *United States* (1919) 250 U.S. 616, 630 (dis. opn. of Holmes, J.).)

Our employment discrimination law attempts to resolve the

conflict by permitting an employee to recover damages for discriminatory verbal harassment, but only if, viewed against the totality of the circumstances, the harassment is so severe or pervasive as to create a hostile or abusive work environment. Although some have questioned whether this standard sufficiently protects freedom of speech (see, e.g., Comment, *Freedom of Speech and Workplace Harassment* (1992) 39 U.C.L.A. L.Rev. 1791), the standard's validity is not at issue here. What is at issue is whether a trial court, after a finding of hostile environment employment discrimination, may upset the legislatively defined balance, tilting it decidedly to one side, by prohibiting future use of even isolated epithets without regard to their effect on any employee. Unlike the plurality, I would hold that an injunction so drawn violates the free speech guarantees of the state and federal Constitutions. For this reason, I dissent.

KENNARD, J.

DISSENTING OPINION BY BROWN, J.

In America, Father Terminiello can give a speech in which he describes the crowd outside the auditorium as " 'imported from Russia' " (*Terminiello* v. *Chicago* (1949) 337 U.S. 1, 19 (dis. opn. of Jackson, J.)) and then adds, "I speak of the Communistic Zionist Jew .... We don't want them here; we want them to go back where they came from." (*Id.* at p. 21.) In America, Clarence Brandenburg can attend a Ku Klux Klan rally, stand near a large burning cross wearing a hood, and give a speech saying, "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." (*Brandenburg* v. *Ohio* (1969) 395 U.S. 444, 447.) In America, Nazis can march through the streets of the predominately Jewish community of Skokie, Illinois, wearing uniforms and displaying swastikas. (*National Socialist Party* v. *Skokie* (1977) 432 U.S. 43; see also *Collin* v. *Smith* (1978) 578 F.2d 1197, cert. den. 439 U.S. 916.) In each instance, racist and discriminatory views are being expressed. Nevertheless, these expressions are protected by the First Amendment to the federal Constitution and by our state Constitution. We as a nation so value the free exchange of ideas that we are willing to tolerate even offensive ideas, knowing that "one man's vulgarity is another's lyric" (*Cohen* v. *California* (1971) 403 U.S. 15, 25) and today's heretical idea may become tomorrow's gospel.

"[T]ime has upset many fighting faiths." (*Abrams* v. *United States* (1919) 250 U.S. 616, 630 (dis. opn. of Holmes, J.).) For example, the abolition of slavery, women's suffrage, and even a solar-centric solar system were once controversial ideas, but today are considered conventional wisdom. Some ideas—like bigotry and prejudice—have been wrong from the beginning and always will be. And when we are confronted with bigotry, our visceral reaction is to strike back hard, which in this case took the form of the tough injunction the court upholds today. But hostility, hatred, jealousy, resentment, envy, and vengefulness are passions as old as humankind and, though the expression of such sentiments may cause much misery and mischief, hateful thoughts cannot be quelled at too great a cost to freedom. "That at any rate is the theory of our Constitution." (*Ibid.*)

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or

disagreeable" (*Texas* v. *Johnson* (1989) 491 U.S. 397, 414)—that is, until today. Today, this court holds that an idea that happens to offend someone in the workplace is "not constitutionally protected." (Plur. opn., *ante*, at p. 18.) Why? Because it creates a "hostile . . . work environment" (*id.* at p. 1) in violation of the Fair Employment and Housing Act (FEHA). (Gov. Code, § 12900 et seq.) In essence, the court has recognized the FEHA exception to the First Amendment.

In *Meritor Savings Bank* v. *Vinson* (1986) 477 U.S. 57 (*Meritor*), the United States Supreme Court held that a "hostile environment" could constitute workplace sex discrimination in violation of title VII of the Civil Rights Act of 1964 (Title VII). (*Meritor*, *supra*, 477 U.S. at pp. 66, 73.) Specifically, the high court held that a plaintiff need not suffer " 'tangible loss' of 'an economic character,' " as distinguished from " 'purely psychological aspects of the workplace environment,' " in order to recover under Title VII. (*Meritor*, *supra*, 477 U.S. at p. 64.) In support of its holding, the court cited with approval the Equal Employment Opportunity Commission's guidelines on discrimination because of sex, which defined unlawful "sexual harassment" as including " 'verbal . . . conduct of a sexual nature.' . . . [having] 'the purpose or effect of . . . creating an intimidating, hostile, or offensive working environment.' " (*Id.* at p. 65.)

In *Harris* v. *Forklift Systems, Inc.* (1993) 510 U.S. 17 (*Harris*), the court reaffirmed and refined its holding in *Meritor*. The court held that a discriminatory environment need not cause "concrete psychological harm" to violate Title VII; rather, it need only "reasonably be perceived . . . as hostile or abusive." (*Id.* at p. 22.) More important, in *Harris*, unlike *Meritor*, the only conduct that was at issue was offensive speech. Thus, in *Harris* (and in dictum in *Meritor*), the high court recognized what is in essence the statutory tort of injurious speech. How does that holding reconcile with the court's statement just a few years earlier in *Hustler Magazine* v. *Falwell* (1988) 485 U.S. 46, reaffirming its "longstanding refusal to allow damages to be awarded because . . . speech . . . may have an adverse emotional impact on the audience"? (*Id.* at p. 55.) The residents of Skokie, Illinois—some of whom had survived the horrors of the Holocaust in Europe only to face similar hatred on the streets of America—must have learned about *Meritor* and *Harris* and

wondered why hostile and offensive speech is remediable in the often rough-and-tumble environment of the workplace, but not on the streets and sidewalks of our neighborhoods. (See *Rowan* v. *United States Post Office Department* (1970) 397 U.S. 728, 738 [upholding a statute protecting people from objectionable speech in the places where they live].) A constitutional scholar would answer that the high court has never addressed whether Title VII's ban on "offensive" "verbal . . . conduct" in the workplace is consistent with the First Amendment. (*Meritor*, *supra*, 477 U.S. at p. 65.) Nevertheless, the plurality opinion assumes the high court resolved that issue long ago and in favor of censorship.

The plurality notes that the FEHA has the same broad scope as Title VII, and, like Title VII, it prohibits "[v]erbal harassment" (plur. opn., *ante*, at p. 7) that is " 'sufficiently pervasive so as to . . . create an abusive working environment . . . .' " (Plur. opn., *ante*, at p. 8, quoting *Fisher* v. *San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608.) Then, with an offhand summary of the holdings in *Meritor* and *Harris* and no further analysis, the plurality states that "these decisions are at least implicitly inconsistent with any suggestion that speech of this nature is constitutionally protected." (Plur. opn., *ante*, at p. 14.) Why? These cases did not even discuss the First Amendment, let alone apply it. Finally, the plurality relies on dictum that is not even on point from *R.A.V.* v. *St. Paul* (1992) 505 U.S. 377 (*R.A.V.*).

The issue in *R.A.V.* had nothing to do with Title VII or workplace discrimination. Rather, *R.A.V.* held that, even when speech falls within a category that is generally subject to regulation—such as obscenity, defamation, or fighting words—the government cannot regulate the speech in a content-based way. (*R.A.V.*, *supra*, 505 U.S. at pp. 383-384.) "Thus, the government may proscribe libel; but it may not . . . proscrib[e] *only* libel critical of the government." (*Id.* at p. 384.) Similarly, the government may proscribe fighting words, but it may not proscribe only those fighting words that "provoke violence 'on the basis of race, color, creed, religion or gender.' " (*Id.* at p. 391.) In dictum elaborating on this point, the court noted that this content-neutrality requirement is less strict in the case of fighting words and similar "proscribable speech" than in the case of "fully protected speech." (*Id.* at p. 387.) As an example, the court noted, expressly without deciding, that "sexually

derogatory 'fighting words,' among other words, *may*" violate Title VII, though this regulation of only those fighting words that are "sexually derogatory" is obviously not content neutral. (*Id.* at p. 389, italics added.)

This tentative dictum is hardly a "ruling[]" (plur. opn., *ante*, at p. 18) that "leave[s] little room for doubt" (*id.* at p. 15), and, in any case, it is clearly limited to "proscribable speech" such as fighting words. Indeed, if it were not so limited, it would fail to illustrate the high court's point, which is that the content-neutrality requirement applies less strictly in the case of "proscribable speech." As such, this dictum can hardly be characterized as a definitive determination that the First Amendment does not protect speech that creates a hostile work environment. On the contrary, *R.A.V.* emphasizes that the content-neutral requirement is more strict in the case of "fully protected speech." (*R.A.V.*, *supra*, 505 U.S. at p. 387.) Thus, if anything, *R.A.V.* suggests Title VII's content-based regulation of speech is invalid to the extent it regulates "fully protected speech" like the speech at issue here. In other words, if the ordinance at issue in *R.A.V.* was unconstitutional because it singled out for regulation only those fighting words that "provoke[d] violence 'on the basis of race, color, creed, religion or gender' " (*R.A.V.*, *supra*, 505 U.S. at p. 391), then a fortiori Title VII is unconstitutional because it is a content-based regulation of speech *not* limited to fighting words.

I can think of no circumstance in which this court has brushed aside such an important constitutional protection as the right to free speech on the basis of so little analysis or authority. And it is no answer that the government is merely proscribing discriminatory conduct, whether or not spoken words are an integral part of that conduct, and therefore it can incidentally regulate speech in the workplace without violating the First Amendment. (Plur. opn., *ante*, at pp. 13-14, 18, fn. 6.) Here, it is the speaker's philosophical beliefs and opinions themselves that cause the injury, and it is those beliefs and opinions that the government wants to censor. If government can censor those beliefs and opinions under the rubric of merely proscribing discriminatory conduct, then it can also punish Father Terminiello for discriminatorily denouncing Russian Jews in his speech in a Chicago auditorium, and it can punish Clarence Brandenburg for advocating the deportation of Blacks, and it can prevent Nazis from marching through the streets of Skokie.

Indeed, if applied generally, the plurality's rule would create the exception that swallowed the First Amendment. As part of the FEHA, the Legislature has also attempted to address the problem of discrimination in our neighborhoods by regulating residential real estate transactions. (Gov. Code, § 12955.) If, in furtherance of this goal, the Legislature had enacted a prohibition against "verbal conduct" creating a "hostile sidewalk environment" analogous to the similar prohibition that applies in the workplace, courts could then enjoin speeches and parades that express discriminatory ideas, and under the plurality's open-ended standard, these injunctions would be constitutional because they merely proscribed discriminatory conduct with only an incidental effect on speech. The plurality simply has not explained what makes the workplace different from all the other places where we have to put up with hateful and discriminatory speech.

Moreover, here we are not dealing merely with a regulation of speech, we are dealing with an absolute prohibition—a prior restraint. Prior restraints of speech are particularly inimical because they do not merely place a burden on the speaker's ability to communicate a message; rather they erase that message before its effects can be assessed. The plurality repeatedly asserts that the prior restraint at issue here is permitted under the First Amendment "because defendants simply were enjoined from continuing a course of repetitive speech that had been judicially determined to constitute unlawful harassment in violation of the FEHA." (Plur. opn., *ante*, at p. 29; see also *id.* at pp. 1, 22-23, 25, 33.) So speech that is "unlawful" is now unprotected by the state and federal Constitutions. That standard turns the world on its head. In effect, the plurality says, "The Legislature, acting in response to current popular sentiments, has carved out certain ideas from the universe of ideas and declared them to be bad ideas, and once an idea has been judicially determined to be one of these bad ideas, courts can prohibit anyone from expressing it." I disagree.

Justice Werdegar's concurring opinion, though it agrees the court's analysis is fatally flawed (conc. opn., *ante*, at pp. 4-6) and tries harder to address the First Amendment issues, is no more persuasive. Conceding that none of the existing First Amendment doctrines standing alone permits the injunction at issue here, she carves a new exception from the First Amendment because a

"contrary holding" (*id.* at p. 26) would mean "Lawrence's First Amendment rights . . . outweigh the rights of the Latino plaintiffs to be free of unwanted racial discrimination." (*Id.* at p. 27.)

The Constitution, however, has already balanced the scales. Plaintiffs should not be subjected to racial invectives in the workplace. But this case is not, as Justice Werdegar suggests, an all-or-nothing choice between either upholding the injunction or subjecting employees to a "constant stream of [denigrating] verbiage." (Conc. opn., *ante*, at p. 26, fn. omitted.) There is a middleground: employees can sue and recover damages. It is hard to imagine any employer would continue to tolerate discriminatory speech in the workplace after shouldering the cost of litigation and a damage award, and, if it did, it would run the risk of paying a second award, including hefty punitive damages and attorney fees. I think that remedy is sufficient to deter any "unwanted racial discrimination." (*Id.* at p. 27.)

As Justice Werdegar recognizes, this case pits freedom of speech against racial equality, and because the tension between freedom and equality cannot be reconciled, the best that can be achieved is a rough equilibrium. (Conc. opn., *ante*, at pp. 27, 29.) In this regard, the California Constitution strikes the appropriate balance by distinguishing between prior restraints and all other regulations of speech. Article I, section 2, subdivision (a), of the state Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." In *Dailey* v. *Superior Court* (1896) 112 Cal. 94, 97 (*Dailey*), discussing an earlier, almost identical version of this provision, we said, "The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility."

Since *Dailey*, we have upheld injunctions against speech, but only proscribable speech such as obscenity or fighting words, or where other compelling circumstances made injunctive relief

absolutely necessary. (Cf. *People ex rel. Gallo* v. *Acuna* (1996) 14 Cal.4th 1090.) No such circumstances exist here, where the speaker has merely expressed disgusting opinions and may well have ceased doing so. Forcibly prohibiting expression may only reinforce the animosities we are trying to subvert. In permitting speech, but requiring the speaker to pay damages for injurious speech, the California Constitution preserves both the freedom of the speaker and the equal dignity of the audience. This compromise not only discourages injurious speech, but may also foster positive change in the speaker's attitudes. Accordingly, I would draw the line in the same place as the California Constitution and find the injunction at issue here to be an unconstitutional prior restraint of speech.

The court also rejects defendants' argument that the injunction here is overly broad. Justice Werdegar's concurring opinion does not address this issue other than to state that the injunction must be "sufficiently narrowed on remand to apply to the workplace only." (Conc. opn., *ante*, at p. 28.) The plurality opinion recognizes that an injunction restraining speech must "burden no more speech than necessary to serve a significant government interest" (*Madsen* v. *Women's Health Center, Inc.* (1994) 512 U.S. 753, 765), but argues that this injunction satisfies that standard. (Plur. opn., *ante*, at p. 31.) I disagree.

First, because we are deciding this case on a very limited record, we do not know what exactly plaintiffs' supervisor said, how often he said it, or what the surrounding circumstances were. Moreover, we do not know whether the damages award, which defendants have chosen not to challenge, was adequate to bring an end to the conduct that created the hostile work environment. Therefore, we do not know if the broad injunction was necessary, or if a more specific one prohibiting, for example, only pervasive use of certain epithets would have sufficed. Second, the injunction does not merely prohibit plaintiffs' supervisor from repeating his discriminatory comments in plaintiffs' presence; rather, it prohibits him from repeating them anywhere in the workplace. The United States Supreme Court made clear in *Harris* that, "if the victim does not subjectively perceive the [work] environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." (*Harris*, *supra*, 510 U.S. at pp. 21-22.) This standard also applies under the FEHA.

(Plur. opn., *ante*, at p. 8.) Therefore, if an employee never learns about the use of certain words in the workplace, those words cannot create a hostile work environment for that employee. I see no reason under this standard to enjoin plaintiffs' supervisor from expressing his discriminatory opinions to persons in the workplace who are not offended by them. In sum, even if the injunction at issue here were otherwise constitutional, it is overly broad as written and therefore invalid.

Every age has its fashionable ideas and its disfavored ideas. In the early part of this century, the public was particularly thin-skinned about communism. Courts tried to prohibit and punish the dissemination of communist ideas, but the United States Supreme Court struck down these decisions with a resounding no. (See, e.g., *Gitlow* v. *New York* (1925) 268 U.S. 652.) Justice Holmes added the phrase "free trade in ideas" to our judicial lexicon and admonished us that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." (*Abrams* v. *United States*, *supra*, 250 U.S. at p. 630 (dis. opn. of Holmes, J.).) In other words, the only way to fight a bad idea is with a good idea. But today this court reopens the door to censorship with a resounding yes. The Legislature is now free to prohibit the expression of ideas it dislikes, and courts can enforce these prohibitions with injunctions.

None of us on this court condones ethnic and racial discrimination in the workplace, but the issue in this case is speech, not just discrimination. Speech is unpleasant sometimes. It may be disgusting. It may be offensive. Contrary to the nursery rhyme, it may even be injurious. But, with few exceptions, none of which applies, the state and federal Constitutions prohibit courts from using their injunctive power as a surgical instrument to extricate disfavored ideas from the popular discourse, and this principle applies even here where the ideas in question were, from what we can tell from the limited record, both offensive and abhorrent.

One of the truths we hold to be self-evident is that a government that tells its citizens what they may *say* will soon be dictating what they may *think*. But in a country that puts such a high premium on freedom, we cannot allow ourselves to be the captives of orthodox, culturally imposed thinking patterns. Indeed, I can conceive no

imprisonment so complete, no subjugation so absolute, no debasement so abject as the enslavement of the mind.

Fundamentally, this is a case about equality and freedom. Thus, it is a case about our most basic political ideals; about our highest aspirations and our greatest failures; our toughest challenges and our deepest fears. It is about a bafflingly elusive dream of equality and the freedom, not immune from abuse, to speak words that make others more than uncomfortable. It is a case about equality and freedom and the irreconcilable tension between the two. We are all the beneficiaries of the freedom the Constitution guarantees, and we all pay its costs, even though the price may sometimes be anguish.

I dissent.

BROWN, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Unpublished Opinion

Original Appeal

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Judge: Carlos Bea

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APPENDIX B

CERTIFIED FOR PUBLICATION
SEE CONCURRING AND DISSENTING OPINION

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

FILED
Court of Appeal, First App. Dist.
May 21, 1996
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OSCAR AGUILAR, et al.,
Plaintiffs and Respondents,
v.
AVIS RENT-A-CAR SYSTEM, INC., et al.,
Defendants and Appellants.

A069353
(San Francisco
Super.Ct.No. 948597)

I. INTRODUCTION

In this case we hold that an injunction prohibiting a manager's continued use of racist epithets in the workplace, where such use was sufficiently severe or pervasive to alter the conditions of the victims' employment and create an abusive work environment, does not violate the constitutional proscription against prior restraints, because the injunction targets conduct amounting to employment discrimination as a "secondary effect" of such speech within the meaning of *R. A. V. v. St. Paul* (1992) 505 U.S. 377, rather than targeting the expressive content of the speech, and thus is not content based.

The employer, Avis Rent-A-Car System, Inc., and the manager, John Lawrence, challenge the constitutionality of an injunction by

which the trial court sought to remedy employment discrimination violating the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). The injunction prohibits Lawrence from "using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees," and also orders him to refrain from "any uninvited intentional touching" of those employees, as long as he is employed by Avis in California. It is not limited to the workplace.

We conclude that to the extent the injunction prohibits Lawrence from continuing to use racist epithets in the workplace it is constitutionally sound, but to the extent it reaches beyond the workplace it improperly exceeds the scope of the FEHA violation sought to be prevented and must be modified accordingly. We reverse the injunctive portion of the judgment and remand the cause for modification to narrow the injunction's scope and describe the prohibited conduct with further specificity.

II. BACKGROUND

Avis employed the 17 Hispanic/Latino plaintiffs in this case as drivers at its San Francisco airport location, responsible for moving automobiles between parking lots and check-in and service station areas. In 1993, they sued Avis and ten individual managers, alleging multiple causes of action including employment discrimination in violation of FEHA.

According to the complaint, the individual defendants engaged in racially discriminatory harassment which created an abusive work environment. (Gov. Code, § 12940, subd. (h)(1); *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal. App. 4th 397, 409.) The basis of an abusive work environment claim is "'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment . . . .'" (*Harris v. Forklift Systems, Inc.* (1993) ___ U.S. ___ [126 L. Ed. 2d 295, 301], quoting *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 65, 67.) The complaint alleged that Lawrence in particular, who was the service station manager, routinely called the plaintiffs "'motherfuckers' and other derogatory names, and continually demeaned them on the basis of their race, national origin and lack of English language skills."

The case went to a jury as to twelve of the plaintiffs, three of the individual defendants, and Avis, with mixed results. The jury found

racial discrimination as to eight plaintiffs and awarded each of them damages for emotional distress in the sums of either $ 15,000 or $ 25,000, for a total monetary award of $ 135,000. As to three of these plaintiffs the discrimination was by Lawrence; as to the other five the discrimination was by an Avis employee named Kathy Black who no longer worked at the San Francisco airport location.[1] As to a ninth plaintiff, the jury found discrimination by Lawrence but no emotional distress. The jury found no discrimination as to the remaining three plaintiffs, and no discrimination by Avis managers other than Lawrence and Black.

After the verdicts, the eight prevailing plaintiffs requested injunctive relief limited to the San Francisco airport location, requiring among other things that Lawrence and Avis "cease and desist from all harassment or discrimination of employees whose national origin is from Latin America . . . ." The defense objected that this language was vague and overbroad. The judge granted an injunction, but changed the proposed language to specify racial slurs and touchings[2] by Lawrence and to extend beyond the San Francisco airport location.

The injunction states in pertinent part: "Defendant John Lawrence shall cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent-A-Car System, Inc., and shall further refrain from any uninvited intentional touching of said Hispanic/Latino employees, as long as he is employed by Avis Rent A Car System, Inc. in California." The injunction also orders Avis not to allow

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[1] Because the verdicts did not specify any particular cause of action, they imply findings in favor of the prevailing plaintiffs on all causes of action, including employment discrimination in violation of FEHA. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal. 3d 663, 673.)

[2] The judge explained from the bench that one of the plaintiffs had complained that Lawrence "would come along and pop these fellows on the back." Our concurring and dissenting colleague transforms this observation into a so-called finding that "Lawrence had 'popped' an employee on the back in previous years" (conc. & dis. opn., post, p. 985 [typed opn. p. 33], italics added), implying this happened only once. What the judge actually said was that one plaintiff had complained that Lawrence "would" do this to "these fellows" -- i.e., there were multiple touchings, not a single incident.

Lawrence to commit such acts "under circumstances in which it knew or should have known of such acts . . . ."[3]

The court rendered judgment incorporating the jury verdict and the injunction, and Avis and Lawrence (hereafter Avis) filed a timely notice of appeal expressly limited to the injunctive portion of the judgment.

III. DISCUSSION

Our primary concern in this appeal is with the constitutional implications of government regulation of speech in the workplace. Avis contends the challenged injunction restricts Lawrence's speech solely on the basis of its content and thus violates the First Amendment as well as our state Constitution (Cal. Const., art. I, § 2, subd. (a)).

A. The Factual Underpinnings

The evidentiary posture of this appeal is critical to resolution of the issues presented.

This is a partial appeal on a record lacking a reporter's transcript of the trial. Avis has not appealed the damages portions of the judgment, and has elected to proceed by appendix (Cal. Rules of Court, rule 5.1) without a trial transcript, designating for transcription only the oral arguments on the posttrial hearings on injunctive relief.

This course of action by Avis has two fundamental consequences. First, because the appeal is partial, the unappealed damages portions of the judgment "'must be deemed final, being a final judgment of the facts and rights which they determine.'" (*Gonzales v. R.J. Novick Constr. Co.* (1978) 20 Cal. 3d 798, 805, quoting *Whalen v. Smith* (1912) 163 Cal. 360, 362-363.) This means that the factual underpinnings of the damages portions of the judgment have been finally determined and are no longer subject to dispute.

Second, because "the record does not contain the evidence presented at the trial, it must be presumed conclusively that the findings are supported by the evidence." (*Robert S. Bryant, Inc. v.*

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[3] The injunction further orders Avis to display, at the San Francisco airport location, posters and a policy statement concerning complaints of employment discrimination.

Taber (1962) 199 Cal. App. 2d 884, 885; accord, e.g., *Burns v. Brown* (1946) 76 Cal. App. 2d 639, 643.) Avis's election to proceed without a trial transcript invokes this conclusive presumption not only as to the factual underpinnings for the damages portions of the judgment, but also as to the trial judge's factual determinations on the injunctive portion. The judge stated from the bench that "there was evidence presented sufficient for the jury to find that . . . Lawrence had engaged in acts of harassment so continual and severe as to alter the working conditions for those people there," and "the court is making a finding of fact based on evidence observed during the trial, that . . . there's a substantial likelihood based on his actions that he will do so in the future unless restrained." Because Avis chose not to give us the trial evidence, the factual underpinnings of the damages and injunctive portions of the judgment are conclusively presumed.

Indeed, Avis concedes these factual underpinnings in its reply brief, which states, "Here, appellants *are not disputing the questions of fact that give rise to the injunction*, which Respondents have had ample opportunity to plead and prove. On this appeal, Appellants are challenging the injunction as written, *not because the underlying facts do not warrant the injunction*, but because Appellants contend the language is impermissible on a constitutional basis." (Italics added.) This is an admission of the undisputed factual basis for the injunction, and we treat the admission as binding against Avis. (*Franklin v. Appel* (1992) 8 Cal. App. 4th 875, 893, fn. 11; *Mangini v. Aerojet-General Corp.* (1991) 230 Cal. App. 3d 1125, 1152.)

The factual underpinnings of the FEHA claim are thus conclusively established by the partial nature of the appeal, by the form of the appellate record, and by Avis's own admission. Those factual underpinnings are in the complaint's allegations that Lawrence "continually demeaned [plaintiffs] on the basis of their race, national origin and lack of English language skills." Indeed, to prove the abusive work environment claim -- that is, that Lawrence's racist invective was sufficiently severe or pervasive to alter the conditions of the plaintiffs' employment (*Harris v. Forklift Systems, Inc., supra*, ___ U.S. at p. ___ [126 L. Ed. 2d at p. 301]) -- the plaintiffs' goal was to show "'a steady barrage of opprobrious racial comment.'" (*Hicks v. Gates Rubber Co.* (10th Cir. 1987) 833 F.2d 1406, 1412-1413, quoting *Johnson v. Bunny Bread Co.* (8th Cir. 1981) 646 F.2d

1250, 1257.) Given the peculiar appellate posture of this case, we must assume they made that showing.[4]

Consequently, on this appeal, the operative fact is that Lawrence subjected three plaintiffs not merely to occasional rude or impolite language, but to a continual barrage of opprobrious racist invective. He did not, as our concurring and dissenting colleague suggests, merely refer to his coworkers as "motherfuckers." (Conc. & dis. opn., *post*, at pp. ____, fns. 25, 30 [typed opn. pp. 30, 35-36, fns. 25, 30].)[5]

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[4] We recognize that in First Amendment cases there is a special rule of de novo appellate review of the record on questions of constitutional fact. (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 509, fn. 27.) But this rule merely displaces the substantial evidence doctrine (*McCoy v. Hearst Corp.* (1986) 42 Cal. 3d 835, 846, fn. 7), which is otherwise implicated in a challenge to the sufficiency of the evidence to support a judgment. The First Amendment exception to the substantial evidence rule cannot logically apply under the peculiar circumstances of the present case, where, because of Avis's choice of a partial appeal and partial record, it is conclusively established that the evidence is sufficient to support the judgment, and Avis does not challenge but concedes the sufficiency of the evidence. The First Amendment exception does not displace the rules applicable to a partial appeal on a record lacking a trial transcript. Indeed, in appeals without a reporter's transcript, respondents are precluded by court rules from designating the evidentiary record that the First Amendment exception would otherwise require. (Cal. Rules of Court, rules 5(f), 5.1(j).)

[5] Although the state of the record prevents us from knowing what else Lawrence called the three plaintiffs in addition to "motherfuckers," a newspaper article about this case may give a clue: it asserts he called them "wetbacks" and "racial epithets in Spanish." (Holding, *Key Test for Speech Limits*, San Francisco Chronicle (Dec. 18, 1995) p. B5, col. 1.) Restricted as we are, however, to the record and admissions before us, without relying on or giving any dispositive weight to the newspaper article (*Rains v. Belshé* (1995) 32 Cal. App. 4th 157, 183, fn. 6), we are limited to the operative fact that racist epithets were spoken, without knowing what they were.

Our concurring and dissenting colleague speculates that the word motherfucker "was apparently used to express Lawrence's sentiments concerning what he perceived as the unacceptable job performance of coworkers." (Conc. & dis. opn., post, p. ___, fns. 25 [typed opn. p. 30, fn. 25].) But, lacking an evidentiary record, we have no idea why Lawrence called the plaintiffs motherfuckers. The word has no special meaning pertaining to job performance; one dictionary defines it as "a detestable person." (New Dict. of American Slang (1986) p. 283.) Nothing in the abbreviated record suggests that the plaintiffs' job performance was in fact "unacceptable" or that Lawrence called them motherfuckers for that reason. It is just as plausible this was nothing other than unprovoked abuse.

B. The Law of Racist Speech in the Workplace

The question of how the law should respond to verbal abuse in the form of racial and ethnic slurs has perplexed the courts and legal scholars for years. Half a century ago, the United States Supreme Court declared that government may proscribe "fighting words" which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." (*Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 572.) Some legal scholars have argued that racial and ethnic slurs "by their very utterance inflict injury" (ibid.) through profound humiliation and the implicit threat of violence, causing psychological and emotional damage, and should not receive constitutional protection. (E.g., Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling* (1982) 17 Harv. C.R.-C.L. L.Rev. 133, 135-147; C. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech On Campus* (1990) 1990 Duke L.J. 431, 452, 461-462; Matsuda, *Public Response to Racist Speech: Considering the Victim's Story* (1989) 87 Mich L.Rev. 2320, 2335-2338, 2357.) Others disagree, advocating total constitutional protection or some sort of middle ground. (See Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma* (1991) 32 William & Mary L.Rev. 211.)[6]

The courts have restricted application of the fighting words doctrine to speech that presents an actual danger it will cause a breach of the peace. (See *Collin v. Smith* (N.D. Ill. 1978) 447 F. Supp. 676, 691.) The curious result is that the doctrine protects those who are likely to react with violence, but not those who are too fearful to fight back. (See F. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech* (1993) 68 Notre Dame L.Rev. 673, 710-711; Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America* (1994) 80 Cornell L.Rev. 43, 80.) It excludes many victims of racial epithets, which commonly arise in an intimidating context "evoking the ever-present specter of bias-

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[6] We endorse neither view in this opinion. Nevertheless, our concurring and dissenting colleague discusses and criticizes the Matsuda law review article at great length. (Conc. & dis. opn., post, at pp. ___ & fns. 5, 6, 12, 14 & 15 [typed opn. pp. 12-13, 17-19, & fns. 5, 6, 12, 14, & 15].) We do not rely on Matsuda's thought-provoking ideas, however, but simply note the existence of a vigorous debate on this subject. We have no hidden agenda. Our holding in this case would have been the same if the Matsuda article had never been written.

motivated violence, and, with it, real fear in the recipient." (Stevens, *The Freedom of Speech* (1993) 102 Yale L.J. 1293, 1311.) Victims of racist speech are frequently too intimidated to react with violence -- especially where, as here, the speaker is a manager where they work. Thus, racist invective is often beyond the reach of the fighting words doctrine.[7]

One venue where there has been no ambiguity, however, is the workplace. Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate because of "race, color, religion, sex, or national origin." (42 U.S.C. § 2000e-2, subd. (a)(1).) This proscription encompasses racial harassment that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment. (*Harris v. Forklift Systems, Inc., supra,* ___ U.S. at p. ___ [126 L. Ed. 2d at p. 301].) The same rule applies under FEHA (Gov. Code, § 12940, subd. (h)(1); *Kelly-Zurian v. Wohl Shoe Co., supra,* 22 Cal. App. 4th at p. 409), where the definition of "harassment" includes "verbal harassment, e.g., epithets, derogatory comments or slurs . . . ." (Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(A).)

Frequent or pervasive workplace use of racial slurs resulting in an abusive work environment has been held to constitute actionable racial harassment under Title VII. (*Daniels v. Essex Group, Inc.* (7th Cir. 1991) 937 F.2d 1264, 1273-1274 [frequent racist taunts created subjectively and objectively abusive work environment].) Such conduct has also been *enjoined* under Title VII. (*E.E.O.C. v. Beverage Canners, Inc.* (11th Cir. 1990) 897 F.2d 1067, 1070 [injunctive relief for frequent racist remarks made to or about black employees by manager and coworkers]; *Snell v. Suffolk County* (D.C.N.Y. 1985) 611 F. Supp. 521, 532 [injunction requiring employer to prohibit employees from using specified racial and ethnic epithets]; cf. *Robinson v. Jacksonville Shipyards, Inc.* (M.D.Fla. 1991) 760 F. Supp. 1486, 1534 [First Amendment "does

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[7] As we reach the conclusion of the 20th century, however, it has become increasingly difficult to know precisely what might amount to fighting words -- particularly, what sort of speech might "tend to incite an immediate breach of the peace." (*Chaplinsky v. New Hampshire, supra,* 315 U.S. at p. 572.) In this age when episodes of violence in the workplace are a regular feature of the news, racist epithets may well be taken as fighting words and elicit a violent response. The line between what is offensive but nonincendiary and what constitutes fighting words has become disturbingly blurred.

not impede the remedy of injunctive relief" for sexual harassment]; *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1515, 1518-1519 [injunctive relief for sexual harassment consisting of persistent sexually offensive remarks].) Discriminatory harassment is also enjoinable under FEHA. (See Gov. Code, § 12920.5 [authorizing "effective remedies that will both prevent and deter unlawful employment practices"]; see *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal. 3d 40, 53,[Fair Employment and Housing Commission may order employer to cease and desist harassment].)[8]

Given the peculiar appellate posture of the present case, and the operative fact that Lawrence subjected three plaintiffs to a continual barrage of racist invective that altered the conditions of their employment, this case is squarely within the ambit of FEHA's proscription of racial harassment that creates an abusive work environment. We need not and do not decide whether this is a fighting words case.

C. The Secondary Effects Rule

The key issue is whether employment discrimination law as applied to racist speech in the workplace is changed by *R. A. V. v. St. Paul, supra,* 505 U.S. 377. In *R. A. V.*, the Supreme Court invalidated a city ordinance against cross burning, which was treated in that case as a form of fighting words, because the ordinance did not proscribe all fighting words but discriminated against a subclass of them based on race, color, creed, religion or gender -- i.e., because of their *content*. (*Id.* at p. 391.) The gist of *R. A. V.* is that "while certain categories of speech and expressive conduct may be regulated, such regulation may not discriminate *within that category* on the basis of content." (*In re Steven S.* (1994) 25 Cal. App. 4th 598, 610, original italics.) Avis contends the prohibition against Lawrence's use of racial slurs is content based and thus violates the rule set forth in *R. A. V.*

But *R. A. V.* enunciated several exceptions to the rule it announced, one of which allows the prohibition of expression because of its *secondary effects* rather than its content. The classic

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[8] In addition, under California law, workplace use of racist epithets may result in tort liability for intentional infliction of emotional distress. (Agarwal v. Johnson (1979) 25 Cal. 3d 932, 947, *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal. 3d 493, 498-499.)

example, cited in *R. A. V.* (505 U.S. at p. 389), is the imposition of zoning restrictions on adult motion picture theaters in order to prevent urban blight, which is a secondary effect of such theaters. (*Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 47-48.) The majority opinion in *R. A. V.* said that "since words can in some circumstances violate laws directed not against speech but against conduct . . ., a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech." [505 U.S. at p. 389.) The opinion then gave an example -- *sexual* harassment -- that is particularly germane to the present appeal: "Thus, for example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices [citation]." (*Ibid.*) The opinion concluded, "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." (*Id* at p. 390.)

R. A. V.'s singling out of sexist epithets tells us that the law against severe or pervasive workplace use of *racist* epithets creating an abusive work environment is alive and well. Indeed, a concurring opinion in that case pointed out that the majority's discussion of the secondary effects rule was *specifically intended* to preserve abusive work environment claims. (*Id* at p. 409-410 (conc. opn. of White, J.).) If severe or pervasive use of sexist epithets may constitute proscribable employment discrimination and "can be swept up incidentally within the reach of a statute directed at conduct rather than speech" (*id* at p. 389), then the same must be true of such use of racist epithets in the workplace. In both instances, the law targets conduct that alters the conditions of employment -- that is, employment discrimination -- rather than mere expression, and is not content based.

Thus, although racist epithets "express a discriminatory idea or philosophy" (*ibid.*), that of racial supremacy, their pervasive use in the workplace is not shielded from regulation under Title VII and FEHA because the target of the regulation is the secondary effect of such conduct -- employment discrimination -- not its expressive content.

This point is driven home in a post-*R. A. V.* case, *Harris v. Forklift Systems, Inc., supra*, ___ U.S. ___ [126 L. Ed. 2d 295], where the United States Supreme Court observed in the closely-

related field of workplace sexual harassment, "A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." (*Id.* at p. [126 L. Ed. 2d at p. 302].) Surely these are secondary effects of severe or pervasive sexist speech; that is what enables government regulation of such speech in the workplace. In FEHA, our Legislature has declared that employment discrimination "foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interests of employees, employers, and the public in general." (Gov. Code, § 12920.) Again, these various societal ills are secondary effects of a discriminatorily abusive work environment, as surely as urban blight is a secondary effect of adult motion picture theaters.

Avis relies on R. A. V.'s observation that "the emotive impact of speech on its audience is not a 'secondary effect.'" (*R. A. V. v. St. Paul, supra*, 505 U.S. at p. 394, quoting *Boos v. Barry* (1988) 485 U.S. 312, 334.) Our concern here, however, is not with the emotive impact of racist speech -- e.g., the hurt feelings or anger caused by a single racial slur -- but with employment discrimination resulting from an abusive work environment created by a continual barrage of racist invective. The key difference is that the employment discrimination claim, like a claim of sexual harassment, is founded on harassing speech that is so severe or pervasive as to alter the conditions of the victim's employment. (*Harris v. Forklift Systems, Inc., supra*, ___ U.S. at p.___ [126 L. Ed. 2d at p. 301].) Such speech has more than an emotive impact. By altering the conditions of employment, as adult motion picture theaters alter the conditions of a neighborhood, such speech crosses the line between constitutionally protected expression and proscribable discriminatory conduct. (Cf. *In re Steven S., supra*, 25 Cal. App. 4th at p. 612 ["fear and intimidation" from cross burning aimed at specific victim "crosses the line between emotive reaction and tangible injury"].)[9]

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[9] Thus, our colleague's citation of *Sebago, Inc. v. City of Alameda* (1989) 211 Cal. App. 3d 1372, for the proposition that listener reactions to speech are not secondary effects (conc. & dis. opn., *post*, p. ___ [typed opn. p. 3]) is accurate in the abstract but meaningless here, where the secondary effect is employment discrimination.

Avis also argues that *R. A. V.'s* exposition of the secondary effects rule is limited to categories of proscribable speech such as fighting words, libel and obscenity, into which Lawrence's speech does not fall -- i.e., that only such proscribable speech may be regulated based on the justification that the target is secondary effect rather than expressive content. Not so. The classic secondary effects case, involving zoning restrictions on adult motion picture theaters, concerned expression that enjoys First Amendment protection (though to a lesser magnitude than political debate). (*Renton v. Playtime Theaters, Inc., supra*, 475 U.S. at pp. 49, fn. 2, 54.) And *R. A. V.* itself said that "sexually derogatory 'fighting words,' *among other words*," may produce a violation of Title VII. (*R. A. V. v. St. Paul, supra*, 505 U.S. at p. 389, italics added.) By including the phrase "among other words," *R. A. V.* expanded its statement on the secondary effects rule beyond categories of proscribable speech to encompass any speech that creates an abusive work environment violating the law of employment discrimination.

In short, *R. A. V.* and *Harris* tell us in no uncertain terms that the workplace use of discriminatory epithets, whether racist or sexist, that is sufficiently severe or pervasive to alter the conditions of employment may be proscribed in order to prevent the secondary effects of an abusive work environment. We conclude that employment discrimination law as applied to such conduct -- authorizing injunctive relief under both Title VII and FEHA -- is not only unchanged, but expressly validated, by *R. A. V.*

D. Prior Restraint

Avis contends the present injunction is an invalid prior restraint under article I, section 2, subdivision (a) of the California Constitution, which provides, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." This provision "is more definitive and inclusive than its federal counterpart" and protects speech "from any prepublication sanctions, i.e., from all prior restraints." (*Pines v. Tomson* (1984) 160 Cal. App. 3d 370, 393.)

We have seen that the *federal* constitutional prohibition of prior restraints has not prevented courts from enjoining racial harassment under Title VII. (*Ante*, p. ____ [typed opn. p. 9].) This is because "potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional

protection." (*Roberts v. United States Jaycees* (1984) 468 U.S. 609, 628.) This is a manifestation of the secondary effects rule described in *R. A. V.*; which permits, as content-neutral regulation, a prohibition of conduct that is not targeted on the basis of its expressive content. (*R. A. V. v. St. Paul, supra*, 505 U.S. at p. 390.)

Professor Tribe explains that "regulations with only *indirect* or minor effects on speech *are really noi prior restraints at all*." (Tribe, American Constitutional Law (2d ed. 1988) p. 1051, fn. 37, italics added.) "The [United States Supreme] Court has held, for example, that a restriction cannot be a prior restraint unless it is *directed at expressive activities* and substantially eliminates opportunities for such expression." (*Id.*, italics added, citing *Arcara v. Cloud Books, Inc.* (1986) 478 U.S. 697, 707, [closure of adult bookstore because of prostitution on premises was permissible because sanction "was directed at unlawful activity having nothing to do with books or other expressive activity"].) Thus, under federal constitutional law, a prepublication sanction such as injunctive relief does not amount to a prior restraint on speech if the target of the sanction is the secondary effect of the speech rather than its expressive content -- that is, if the sanction is *content neutral*.

Is California constitutional law any different in this respect? We think not. There is a paucity of law on point, beyond the basic notion that "sentiments" are protected "from all prior restraints" (*Pines v. Tomson, supra*, 160 Cal. App. 3d at p. 393), but a recent decision would bring California constitutional law in line with the federal rule that a content-neutral prepublication sanction does not violate the rule against prior restraints. In *Lopez v. Tulare Joint Union High School Dist.* (1995) 34 Cal. App. 4th 1302, the court upheld a school board's decision to require a film arts class instructor to have his students delete profanity from a student-produced film. In concluding that the decision did not violate California's constitutional prohibition against prior restraints, the court said, "The Board has not censored the students' expression of ideas; rather the Board has prohibited their expression of those ideas by the use of profane language. The Board's directive cannot be construed as the type of censorship which the California courts have deemed unconstitutional -- censorship based on a disagreement with the views presented, or to avoid criticism of Board policy, or to avoid discussion of controversial issues. Rather, the Board's directive was content neutral and served a valid pedagogical objective." (*Id.* at p. 1329, italics added.)

If, under California constitutional law as applied in *Lopez*, content neutrality takes a prepublication restriction beyond the purview of the California constitutional prohibition against prior restraints, then California law mirrors federal law in this respect. Under both constitutions, a prepublication sanction is not a prior restraint on speech if, by virtue of targeting the secondary effect of speech, it is content neutral. Such a sanction is not a regulation of speech but of nonexpressive conduct -- whether it targets urban blight in the case of adult motion picture theaters, or employment discrimination in the present case -- and for that reason does not violate California's prohibition against prior restraints because it is not a prior restraint of speech "at all." (Tribe, American Constitutional Law, *supra*, at p. 1051, fn. 37.)

E. The Injunction

1. Scope

This brings us to the injunction at hand. It prohibits Lawrence from using racial or ethnic epithets "directed at" Hispanic/Latino employees. With regard to such use in the workplace, there is no constitutional problem. This prohibition is an acceptable FEHA remedy for employment discrimination, aimed at the secondary effects of conduct rather than the expressive content of speech.

The injunction also prohibits Lawrence from using racial or ethnic epithets "descriptive of" Hispanic/Latino employees, and thus goes beyond speech directed at the persons who are the subjects of the invective. Again, with regard to such use in the workplace, there is no constitutional infirmity. Avis argues that racist workplace speech that is neither spoken to nor heard by Hispanic/Latino employees will not affect their working conditions. (See Volokh, *Freedom of Speech and Workplace Harassment* (1992) 39 U.C.L.A. L.Rev.1791, 1871-1872 [proposing workplace harassment rule prohibiting "offensive speech that is targeted at a particular employee" but not "undirected speech, such as overheard conversations between willing employees"].) In the context of the present case, we disagree. Continual use of racist epithets poisons the atmosphere of the workplace, even when some of the invective is not directed at or even heard by the victims. If the Hispanic/Latino employees at Avis's San Francisco airport location know that Lawrence is free to continue voicing his on-the-job racist epithets behind their backs, it will remain a hostile place at which to work. Under the present circumstances, where there was direct racist

invective, continued indirect invective would serve to maintain an abusive work environment, and thus both are properly enjoined.

But the injunction reaches beyond the workplace, and to that extent the court went astray. "It is a familiar doctrine of equity that the scope of [an] injunction will be limited to the wrongful act sought to be prevented." (*Magill Bros. v. Bldg. Service etc. Union* (1942) 20 Cal. 2d 506, 512.) Here, the wrongful act sought to be prevented is employment discrimination through racial harassment that creates an abusive work environment. Lawrence's use of racial or ethnic epithets outside the workplace has nothing to do with the fostering of an abusive work environment at Avis's San Francisco airport location, and thus is beyond the scope of the secondary effects rule as described in R. A. V. Such speech will not contribute to the employment discrimination at issue here. Thus, the inclusion of non-workplace speech (and, likewise, non-workplace uninvited intentional touching) within the scope of the injunction was error.[10]

What is the appropriate appellate remedy? Where part of an injunction is invalid, it is void in its entirety -- and reversal is required -- "[if] a court cannot reasonably undertake to eliminate its invalid operation by severance or construction . . . ." (*In re Berry* (1968) 68 Cal. 2d 137, 156.) Here, we could eliminate the injunction's invalid operation in a way similar to severance or construction -- by modifying the judgment and injunction to narrow their scope to the workplace. We are statutorily authorized to do so (Code Civ. Proc., § 43), and there is judicial precedent for doing so (*Demeter v. Annenson* (1947) 80 Cal. App. 2d 48, [injunction modified by appellate court to limit its duration]). We opt instead for reversal, however, so that the trial judge may have an opportunity to ameliorate the injunction in another respect, which we address next.

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[10] The plaintiffs contend Avis waived this point by failing to raise it below. But "a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts." (*Hale v. Morgan* (1978) 22 Cal. 3d 388, 394; see also *Cabrera v. Plager* (1987) 195 Cal. App. 3d 606, 611.) That is the situation here. In addition, whether the general waiver rule should be applied "'is largely a question of the appellate court's discretion.'" (*Canaan v. Abdelnour* (1985) 40 Cal. 3d 703, 722, fn. 17, quoting *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal. App. 3d 1, 5.) Because the trial court did not announce its expansion of the injunctive language to extend beyond the San Francisco airport location until the last hearing on the injunction request, giving Avis scant opportunity to object, we deem it inappropriate to apply the waiver rule.

2. Vagueness

Avis contends the injunction is vague and ambiguous in prohibiting "derogatory racial or ethnic epithets directed at, or descriptive of," Hispanic/Latino employees, and any "uninvited intentional touching." Avis's opening brief asks, "What do these terms mean?" Complaining that the injunction does not define its terms, Avis wonders how Lawrence will know what is derogatory, what is a racial or ethnic epithet, what it means to be directed at or descriptive of, and what it means for a touching to be uninvited and intentional.

The nine words at issue -- "derogatory," "racial," "ethnic," "epithets," "directed," "descriptive," "uninvited," "intentional" and "touching" -- are not words of art, are not technical or arcane, and are hardly obscure. This is plain English. Indeed, Lawrence seems to know what is proscribed: as defense counsel pointed out in the posttrial hearings, Lawrence ceased his invective once this lawsuit was filed.

If these words are unconstitutionally vague, the same could be said of California's anti-harassment statutes and Judicial Council form restraining orders, which include the more expansive phrases "harass," "disturb the peace," "annoy" and "alarm." (Code Civ. Proc., § 527.6 [person may obtain injunction against conduct "which seriously alarms, annoys, or harasses the person"]; Pen. Code, § 646.9 [stalker who "repeatedly follows or harasses another person and who makes a credible threat" is guilty of crime]; Pen. Code, § 11414 [person who "intentionally harasses the child or ward of any other person because of that person's employment" is guilty of misdemeanor]; Judicial Council of Cal., Form 1285.05 [marital cases; restrained person shall not "disturb the peace" of the other party]; Form 1296.10 [domestic violence cases; restrained person shall not "disturb the peace of the person to be protected"]; Form WH-140 [employee harassment cases; restrained person must not "threaten, alarm, annoy, or harass employee"].)

"It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 110, fn. 15, quoting *American Communications Assn. v. Douds* (1950) 339 U.S. 382, 412.) Avis has done so in its briefs, suggesting several unlikely "scenarios" where Lawrence might unwittingly run afoul of the injunction. Such sophistry is no basis for

a finding of unconstitutional vagueness. "Condemned to the use of words, we can never expect mathematical certainty from our language." (*Grayned, supra*, at p. 110.)

Nevertheless, we acknowledge the difficulty in crafting an injunction that adequately apprises Lawrence and Avis what is prohibited. While we are confident that Lawrence and Avis are perceptive enough to understand what falls within the injunction's general prohibition against "derogatory racial or ethnic epithets," it remains possible that, given cultural differences, words seemingly innocuous to Lawrence might be subjectively offensive to his Hispanic/Latino coworkers.

Our preference is for the injunction to specify further an exemplary list of prohibited epithets, in the manner of the injunction in *Snell v. Suffolk County, supra*, 611 F. Supp. at page 532, which required a jail warden to "forbid the use by correction officers on any County property and on all County business of: (1) epithets such as 'nigger,' 'polack,' 'kike,' 'spic,' 'guinea,' 'honky,' 'mick,' 'coon,' and 'black bitch' (all of which have been used on the job by correction officers in recent years) . . . ."[11] A similar listing of prohibited words

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[11] Are these fighting words, which our concurring and dissenting colleague grudgingly agrees might "arguably" be subject to prior restraint? (Conc. & dis. opn., post, pp. ___ [typed opn. pp.1, 28].) We think it depends on context. "Nigger" hurled by a white manager at a black subordinate might not present an actual danger of a violent response by the intimidated subordinate (see ante, p. ___ [typed opn. p. 8]), but the same utterance to a black stranger on a street corner might produce a very different reaction. Our colleague seems to agree: he asserts that racists epithets would not "necessarily" constitute fighting words, implying they *could* in some instances (conc. & dis. opn., *post*, p. ____ [typed opn. p. 15]), and he says the epithets enjoined in the *Snell* decision *were* fighting words (id. at p. ___, fn. 30 [typed opn. p. 36, fn. 30]). But this propels him into a dilemma in his quest to conclude, unnecessarily, that Lawrence's invectives were not enjoinable as fighting words. Our colleague says the trial judge "could not find the words spoken by Lawrence to be fighting words, since they did not provoke or lead to any immediate violence." (*Id.* at p. ___, fn. 30 [typed opn. p. 36, fn. 30].) But the trial judge actually observed: "Aren't these words such that one can expect them to lead to violence if used over and over again? But they haven't lead to violence, have they?" Evidently the judge thought the invective presented an *actual danger* of causing a breach of the peace, although it did not *actually result* in violence. Yet, only the *actual danger* of violence, not an ultimately violent result, is required by the fighting words doctrine. (See *ante*, p. ____ [typed opn. pp.7-8].) The judge's comments lead to the very conclusion that our colleague finds so repugnant (and that we do not even reach) --

(continued...)

-- specifying epithets "such as" those actually used in the workplace by Lawrence -- would more precisely warn Lawrence and Avis what is forbidden.

Under normal circumstances, we might craft such a listing and modify the injunction accordingly (see *ante*, p. ___ [typed opn. p. 17]), but here we are hamstrung by the peculiar state of the appellate record, which does not contain the trial evidence and therefore does not tell us the specific "derogatory racial or ethnic epithets" Lawrence actually used. (See *ante*, p. ___, fn. 5.) We must therefore defer to the trial judge in this respect, because he, unlike us, knows the words spoken by Lawrence.

We therefore decline to modify the injunction directly. Instead, we shall reverse the injunctive portion of the judgment and remand the cause with directions to the trial judge to (1) redraft the injunction in a manner that (a) limits its scope to the workplace, and (b) adds an exemplary list of prohibited derogatory racial or ethnic epithets, specifying epithets such as those actually used in the workplace by Lawrence, and (2) render a new judgment for plaintiffs incorporating the injunction as redrafted.

3. Need

Finally, we address the question whether an injunction was necessary in this case. At the posttrial hearings on injunctive relief, defense counsel argued that no injunction was needed because the evidence "was almost exclusively that the events took place in 1991 and 1992, not that it was ongoing at the present." The judge responded by expressly finding, "based on evidence observed during the trial, that based on the evidence showing harassment and discrimination . . . by Mr. Lawrence, there's a substantial likelihood based on his actions that he will do so in the future unless restrained. And if he hasn't done so since 1992 to the present, that may be because of the pending action. [¶] And I think that the fact that there's legal action against him has had a salutary effect on him. And

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[11](...continued)
that Lawrence's invectives *were* enjoinable as fighting words. All this is beside the point, however, in light of our conclusion that the utterances invoke the secondary effects rule. The fighting words doctrine is not the basis of our judgment and will not be at issue on remand.

I mean to keep it going by granting the prohibitory injunction."[12] Later, the judge concluded the injunction was necessary "to avoid a multiplicity of torts."

Once again, the state of the appellate record is determinative. The judge relied on the trial evidence to find a substantial likelihood of future harassment and the consequent need for an injunction to avoid multiple lawsuits. Because Avis has chosen not to include the trial evidence in the record, we must conclusively presume that this finding is supported by the evidence -- that is, by evidence of a two-year (1991-1992) period of continual harassment suspended only by the onset of litigation.[13] "An employer that takes curative actions only after it has been sued fails to provide sufficient assurances that it will not repeat the violation to justify denying an injunction." (*E.E.O.C. v. Goodyear Aerospace Corp.* (9th Cir. 1987) 813 F.2d 1539, 1544.)

It is well settled that injunctive relief is appropriate to prevent a multiplicity of actions for damages. (Code Civ. Proc., § 526, subd. (a)(6); *Mendelson v. McCabe* (1904) 144 Cal. 230, 233.) The need for this injunction is indisputable. And, as limited to the workplace, the challenged provisions of the modified injunction will burden no more speech than necessary to serve the significant government interest in proscribing employment discrimination. (*Madsen v. Women's Health Center* (1994) ___ U.S. ___ [129 L. Ed. 2d 593, 608].)[14]

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[12] The plaintiffs commenced this lawsuit close on the heels of Lawrence's continuing harassment. The first amended complaint was filed in April 1993. (The appellate record does not indicate when the original complaint was filed.)

[13] This is the "ongoing pattern of wrongful conduct" that our concurring and dissenting colleague demands. (Conc. & dis. opn., *post*, p. ___ [typed opn. p. 2].) The fact of such conduct is *presumed* because of, not as he claims "belied" by (*ibid.*), the abbreviated appellate record. (*Ante*, at pp. ___ [typed opn. pp. 4-6].)

[14] Three remaining points raised by Avis may be disposed of summarily. Avis contends the portion of the injunction ordering the company not to allow Lawrence to commit the proscribed acts will force the company to abridge Lawrence's speech rights. This argument fails because of our conclusion that the injunction, as modified, will not violate Lawrence's speech rights. Avis contends this portion of the injunction is also vague to the extent it refers to acts which Avis "knew or should have known of." Avis is estopped to assert this point because defense counsel herself proposed this very language. (*Mesecher v. County of San Diego* (1992) 9 Cal. App. 4th 1677, (continued...)

F. Conclusion

Our holding is this: racist workplace speech that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment is enjoinable under FEHA, without violating the constitutional proscription against prior restraints, because the injunction targets conduct amounting to employment discrimination, not free expression, and thus is not content based. The rule against prior restraints is not violated for the simple reason that there is no direct restraint of free expression, since the injunction is directed at conduct rather than expressive activity.[15]

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[14](...continued)
1685.) Avis claims another portion of the injunction, ordering the company not to make Hispanic/Latino employees the targets of investigations regarding breach of employment rules unless no employees other than Hispanics/Latinos are reasonably such targets, is improper because it enjoins conduct that does not violate FEHA. This provision arises from the verdict of discrimination by Kathy Black, who on one occasion targeted Hispanic/Latino drivers when investigating the disappearance of a customer's property from a returned rental car. As part of a pattern of harassment found by the jury, such conduct is indisputably a FEHA violation and thus is properly enjoined.

As for our colleague's claim that "no appellate court has ever held" that an employer could be found in contempt for failing to suppress or control the unauthorized or unratified speech or conduct of employees (conc. & dis. opn., *post*, p. ___ [typed opn. p. 30], he has failed to comprehend the significance of *E.E.O.C. v. Hacienda Hotel, supra*, 881 F.2d at pages 1515-1519, which held an employer liable for its employees' persistent sexually offensive remarks of which it knew or should have known, and upheld an *injunction* against further such discrimination. Obviously, the employer could have been held in contempt for violating the injunction.

[15] The concurring and dissenting opinion repeatedly calls this holding a dictum. (Conc. & dis. opn., post, pp. ___ [typed opn. pp. 1-4, 11, 16, 18, 29-34].) It is not. Our decision to reverse and remand for modification of the injunction to narrow its scope and prescribe the prohibited conduct with greater specificity still leaves pending the ultimate question whether the injunction *as so modified* would be an unconstitutional prior restraint. Our decision of the prior restraint issue is therefore necessary to a full decision on the merits and is binding precedent. (*Bunch v. Coachella Valley Water Dist.* (1989) 214 Cal. App. 3d 203, 212.) This is consistent with our legislative mandate, upon reversal with directions for further trial proceedings on remand, to "pass upon and determine all questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case." (Code Civ. Proc., § 43.) Even our colleague says he would "find" -- which is just a loose euphemism for *hold* (see Dict. of Modern Legal Usage (2d ed. 1995) (continued...)

Our concurring and dissenting colleague characterizes the result in this case as "unprecedented." (Conc. & dis. opn., *post*, at p. ___ [typed opn. p.2].) To the extent he means this is a case of first impression, he is right. But we find ample precedent for our holding in the opinions of the United States Supreme Court crafting the secondary effects doctrine. In our conclusion that racial harassment may have the secondary effect of creating an abusive work environment amounting to enjoinable employment discrimination, we are guided by the obvious analogy to *sexual* harassment in the workplace, which the Supreme Court tells us may likewise have the secondary effect of creating an abusive work environment. If workplace sexual harassment rooted in severe or pervasive sexist speech invokes the secondary effects doctrine and takes such conduct outside the scope of constitutional protection, then surely the same must be true for racial harassment.

Our colleague eloquently invokes the right to freedom of speech, but fails to appreciate that Lawrence has not merely offended his Hispanic/Latino coworkers with what the opinion calls "rude" and "impolite" language (conc. & dis. opn. *post*, at pp. ____ & fn. 19 [typed opn. pp. 5, 21, 26, 31, 32, & fn. 19]), but has created an abusive work environment by subjecting them to continuous racist invective-- that is, he has engaged in constitutionally unprotected *conduct* rather than protected expression. The factual basis for that conclusion is undisputed and is conceded by Avis. This is much more than free expression in a rude or impolite manner. This is employment discrimination.

Our colleague believes we are being "culturally parochial" by imposing "an aesthetic standard of decorum" on "the vigorously physical, more frank and less euphemistic workaday world" of automobile service workers. (Conc. & dis. opn., *post*, at p. ____ [typed opn. p. 31].) We disagree. Common respect for one's coworkers, and freedom from workplace discrimination, are not, in his words, the exclusive reserve of "middle-class manners, appropriate to a court or an office." (*Ibid.*) Title VII and FEHA protect *all* workers equally from racial and sexual harassment. Automobile service workers should not have to settle for less. To

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[15](...continued)
p. 358) -- that the challenged injunction is an unlawful prior restraint. (Conc. & dis. opn., *post*, p. ___ [typed opn. p. 4].)

suggest that we are suppressing nothing more than "impolite expressions of which we do not approve" (conc. & dis. opn., *post*, p. ___ [typed opn. p. 32]) trivializes the grievous harm caused by racial and sexual harassment in the workplace -- conduct which Congress and the California Legislature have made actionable and enjoinable.

If ever there was a case of secondary effects as envisioned by Supreme Court jurisprudence, this is it: employment discrimination created by a manager's severe or pervasive use of racist epithets. If the secondary effects doctrine does not apply here, it does not apply to like conduct amounting to sexual harassment, and it ultimately becomes meaningless, reduced to a clever theory with no practical application. Surely, in *R. A. V. v. St. Paul*, the United States Supreme Court meant to do more than pay lip service to an empty vessel.

Our colleague defends the right to engage in "uninhibited and robust discussion" without prior restraint -- even when it amounts to racial discrimination in the workplace -- as a bulwark against "totalitarian government."(Conc. & dis. opn., *post*, at p. ____, fn. 6 [typed opn. p. 4, fn. 6].) This is strangely ironic in light of the origins of modern totalitarianism in racism itself. (See generally Arendt, The Origins of Totalitarianism (1961).) Ultimately, our disagreement is the casualty of a difficult balancing act between two fundamental concerns of modern democracy: on the one hand, what he rightly extols as "our national tradition . . . to protect the rights of our citizens to freely and fully speak their views" (conc. & dis. opn., *post*, at p. ___ fn. 6 [typed opn. p.4, fn. 6]), and, on the other hand, what we equally cherish as the effort of government to protect its citizens from racial and sexual discrimination. We believe that, through the secondary effects doctrine, the United States Supreme Court has shown us a path that permits us to uphold the latter without transgressing the former.

Finally, putting aside the legalese, let's look at our colleague's view of this case from the perspective, for example, of a black laborer whose supervisor repeatedly calls him a "nigger" at work. What can the employee do? Our colleague would tell him: "Yes, your boss is being rude and impolite, but don't be so middle class; remember that you are working in the vigorously physical, more frank and less euphemistic workaday world. But if you insist on being culturally parochial and doing something about it, short of punching him in the nose and getting yourself fired, you can sue him. After a few years of litigation and thousands of dollars in legal fees, you might recover some money. Just don't expect us to tell him he

can't call you a nigger at work anymore. We can make him pay, but we can't make him stop. But don't worry: if he continues to call you a nigger, *you can sue him again*!" How can this make sense to anyone?

We conclude this injunction, as modified, is not a prior restraint on freedom of expression, but lawfully precludes employment discrimination as a secondary effect of severe or persistent racist speech. Our colleague calls this "overzealous political correctness." (Conc. & dis. opn., *post*, at p. ___ [typed opn. p. 36]). We call it the fulfillment of our Legislature's promise that the democratic ideals of equality, tolerance and pluralism will extend to the workplace.

IV. DISPOSITION

The injunctive portion of the judgment is reversed and the cause is remanded for further proceedings as directed in this opinion. The parties shall bear their own costs on appeal.

King, J.

I concur:

Haning, J.

Trial court:	San Francisco Superior Court
Trial judge:	Hon. Carlos T. Bea
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A069353

Aguilar v. Avis Rent-A-Car System, Inc. -A069353
Concurring/Dissenting Opinion of Peterson, P.J.

I concur in part and respectfully dissent in part, for the reasons which follow.

1. *Overview: The Constitutional Free Speech Rights In Issue Here Cannot Be the Subject of Prior Restraint by an Unconstitutional and Overbroad Injunction*

I concur only with the majority's conclusion that the injunction entered by the trial court is unconstitutionally overbroad and vague. That injunction violates the First Amendment to the federal Constitution and the free speech guarantee of article I, section 2 of the California Constitution.[1] Reversal is, thus, required; and the majority is correct in its actual holding, which reverses the injunction imposed by the trial court.

I respectfully dissent from the majority's remand, supported by an unprecedented creation on appeal of dicta apparently suggesting that prior restraints on speech are constitutional, even though the speech being suppressed does not constitute "fighting words" which might arguably be subject to such restraint.[2] Those statements in dicta are unnecessary and are wrong.[3] Prior restraints on speech such

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[1] I agree with the majority that the portion of the lower court's judgment awarding damages against John Lawrence (Lawrence) to three of the seventeen plaintiffs suing him for inflicting emotional distress is not appealed from and not before us. (Maj. opn., *ante*, at p. 939.) Hence, our focus is not on issues of free speech, if any, which might arguably be implicated by those damage awards. (See *Gooding v. Wilson* (1972) 405 U.S. 518, 521-522.) "We are here concerned with suppression--not punishment." (*Kunz v. New York* (1951) 340 U.S. 290, 295 (Kunz).)

[2] I use the term "arguably" because the U.S. Supreme Court has never upheld an order of prior restraint of speech constituting "fighting words" or otherwise (*Procter & Gamble Co. v. Bankers Trust Co.* (6th Cir. 1996) 78 F.3d 219, 227 (*Procter & Gamble*)); neither has the high court or any appellate court of California (see fn. 17, *post*).

[3] The majority attempts to label this obvious dicta as a "holding." (P. 23, fn. 15.) However, the actual holding of this case, which we learn from the majority's disposition paragraph, is simply that the trial court injunction is "reversed" because it is overbroad and vague. (P. 26.) I agree the majority's decision is precedent for the proposition that the trial court's injunction must be reversed; and its *ratio decidendi*

(continued...)

as the ones imposed by the trial court are unconstitutional and, on this record, unnecessary and futile.

The trial court's injunction in issue here was based upon a factual record which the majority now acknowledges is inadequate; and upon a showing that some years before the trial court's injunction issued, an employee criticized the job performance of four coworkers, out of seventeen who sought damages from him, and referred to them using the rude, but unfortunately increasingly common term, "'motherfuckers.'" The trial court did not, and could not, make the necessary findings of an ongoing pattern of wrongful conduct by Lawrence, which the record we do have belies, and which precedent requires for the issuance of an injunction. The speech in question had ended years before the trial court acted.

The trial court's injunction is facially unconstitutional because it would use prior restraint to suppress speech which is protected by the free speech guarantees of the federal and state Constitutions. The proper appellate remedy in these circumstances has long been established under California case law. We should simply vacate the unconstitutionally overbroad injunction in issue here.

The majority implicitly concedes that imposition of prior restraint on the speech at issue here is unprecedented.(P. 23.) No appellate court in the United States has heretofore upheld a court's injunctive order imposing prior restraint on free speech merely because the speech occurs in a place of employment. "Indeed, the

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[3](...continued)
for this decision, i.e., the injunction is overbroad and vague because it applies outside the workplace and does not specify particular offensive terms, also has the effect of precedent. The majority's general observations in dicta, however, concerning many possible other issues which might arise if the majority were attempting to uphold some differently worded injunction, obviously constitute dicta, not a holding. The authority cited by the majority makes this clear; in *Bunch v. Coachella Valley Water Dist.* (1989) 214 Cal. App. 3d 203, 212, the court held similar "'general observations, unnecessary to the decision'" were dicta. Numerous decisions by our Supreme Court also analyze similar general observations unnecessary to the decision as dicta, and refuse to follow them. (See, e.g., *Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1157 [declining to follow prior dicta in a civil rights action]; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal. 3d 711, 734-735, [declining to follow prior dicta on a First Amendment issue]; see also *Security Pacific National Bank v. Wozab* (1990) 51 Cal. 3d 991, 1003-1004.) Even if the majority's dicta were a holding, however, the majority's statements would still be wrong.

Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." (*Procter & Gamble, supra*, 78 F.3d at p. 227.) The majority's view, expressed in dicta, that speech which is allegedly "'derogatory'" to certain racial groups is always enjoinable in an employment setting simply because that speech produces a particular "'secondary effect'" of causing hurt feelings in some listeners (p. 1), is also contrary to the plain terms of the free speech guarantees in both the United States and California Constitutions. This court (Division Five) has previously observed in considering an ordinance restricting sales of adult publications that "direct listener reaction to speech . . . is . . . content based," and that "'Listeners' reactions to speech are not the type of "secondary effects"'" the federal Supreme Court has proscribed. (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal. App. 3d 1372, 1383-1385 (Sebago).)

The majority has undertaken a radical restructuring of existing First Amendment and California free speech jurisprudence. Its dicta are only supported by the proposal and view of a commentator on allegedly "racist speech," who contends that all allegedly derogatory and demeaning speech in a place of employment is the equivalent of fighting words,[4] because it represents a social evil and causes a secondary effect, outside First Amendment protection, which courts should suppress by orders of prior restraint.[5] The majority expresses

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[4] "'Fighting' words" are a class of speech not entitled to First Amendment protection because they have a "direct tendency" to "provoke the person against whom [they are] directed to acts of violence," and because "by their very utterance [they] inflict injury or tend to incite an immediate breach of the peace." (*Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 574, fn. 8, & 572, italics added (*Chaplinsky*).) Thus, fighting words are limited to that narrow class of speech which "conveys an overriding message of personal injury and *imminent* violence . . . ." (*R. A. V. v. St. Paul* (1992) 505 U.S. 377, 408 (conc. opn. of White, J.) italics added (*R. A. V.*).)

[5] This commentator the majority cites (p. 7) is Professor Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story* (1989) 87 Michigan Law Review 2320, 2357-2358 (Matsuda, *Racist Speech*). The author argues that all racist speech is "best treated as a *sui generis* [*sic*] category, . . . outside the realm of protected discourse," and that "The alternative to recognizing racist speech as qualitatively different because of its content is to continue to *stretch* existing First Amendment exceptions, such as the 'fighting words' doctrine and the 'content/conduct' distinction." (*Id.* at p. 2357, italics added.) The majority has

(continued...)

such unprecedented dicta, as that commentator suggests (while disclaiming any reliance thereon (maj. opn., *ante*, at p. 8, fn. 6)), by "stretching" classic and limited definitions of "fighting words" and the distinction between speech content and conduct to include *all* allegedly derogatory or demeaning speech in the place of employment.

The United States and California Constitutions guarantee uncensored speech to our citizens, subject only to the speaker's responsibility for the abuse of that right after the fact. We, as an intermediate appellate court, are not empowered to so radically suggest alteration of existing constitutional free speech guarantees, or overturning governing precedents of the United States Supreme Court or the California Supreme Court. This case may raise important questions ultimately meriting review by those courts, but we are bound to follow existing precedents, rather than implement innovative schemes posited in law review articles.[6]

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[5](...continued)
followed this suggestion, as I explain *post*, and "stretched" both doctrines to reach its result. The commentator, unlike the majority, freely concedes this "stretching" exercise "ultimately weakens" the First Amendment protection of speech. (Matsuda, *Racist Speech, supra*, 87 Mich.L.Rev. at p. 2357.) Her rationale for such action is this: "Setting aside the *worst forms* of racist speech for special treatment [deprived of First Amendment protection] is a non-neutral, value-laden approach that will better preserve free speech." (*Ibid.*) In other words, free speech protection is preserved by the elimination of all such protection for the "worst forms" of any speech considered racist, a proposition indefensible under First Amendment jurisprudence and impossible to enforce in practical terms. How, for example, are the identity of the "worst forms" of racist speech not entitled to First Amendment protection established as distinguished from the other forms of allegedly racist speech which are entitled to that protection?

[6] The Matsuda comments have also been cited and carried to extreme limits by another commentator cited by the majority (p. 8), who suggests Matsuda's proposal "that only racial or ethnic insults directed against members of groups that are historically oppressed because of their race, color, or national and ethnic origin should be subject to prohibition--has considerable merit. Racial or ethnic insults directed at non-Jewish white Americans simply do not have the capacity to cause the same type of harm as insults directed against subordinated groups." (Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America* (1994) 80 Cornell L.Rev. 43, 81.) No court to date has accepted these suggestions that "considerable merit" exists in selective, race-based application of constitutional free speech protection. The reason seems obvious: For two centuries, our national tradition has (continued...)

I would find, for the reasons which follow, that: (1) The trial court's injunction violated the First Amendment to the federal Constitution and article I, section 2, subdivision (a) of the California Constitution; (2) the majority's dicta supporting the suppression of free speech are unnecessary and wrong; and (3) no remand may be made of this cause to the trial court for reconsideration of its illegal injunction of prior restraint. In whatever way the injunction is recrafted, the record is clear (and respondents do not contrarily contend) that none of Lawrence's speech constituted fighting words. Hence, all this speech, however impolite, is entitled to constitutional protection against an order of prior restraint, even though such speech, after utterance, may subject Lawrence to damages, as this case demonstrates. The trial court on remand may not, years after trial, convert nonfighting words entitled to constitutional protection into fighting words lacking that protection, and thereby justify now a new injunctive order of prior restraint on free speech.

II. *The First Amendment Prevents the Prior Restraint on Speech Which Is Imposed by the Majority*

A. *The Majority's Stretching of the Fighting Words and Content/Conduct Distinction in First Amendment Jurisprudence Is Without Precedent*

The First Amendment of the federal Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . . ." The First Amendment is applicable to the states through the Fourteenth Amendment, and forbids prior restraints on speech. (See *Hague v. C. I. O.* (1939) 307 U.S. 496, 512.)

This case raises an important constitutional issue under the First Amendment that has frequently simmered in academic circles but has never been discussed in depth in the appellate courts of the

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[6](...continued)
been to protect the rights of our citizens to freely and fully speak their views. That tradition of uninhibited and robust discussion is a primary reason we have always been free of a totalitarian government. (See *Southeastern Promotions, Ltd. v. Conrad* (1975) 420 U.S. 546, 559 (Southeastern Promotions).)

United States or California, although the question is sometimes commented upon.[7]

The question is this: Is speech which does not have a direct tendency to lead to imminent violence, i.e., speech which does not constitute "fighting words," deprived of all constitutional free speech protection against prior restraint, simply because it allegedly becomes proscribable conduct (and, therefore, enjoinable) as a result of (1) being uttered in a place of employment and (2) conveying a demeaning, derogatory, or allegedly racist message? The *answer is no*.

It is first clear that Lawrence's speech may not be suppressed as "fighting words." Respondents made no such contention in their briefs or at the injunction hearing before the trial court. They essentially conceded at oral argument that the fighting words doctrine is not at issue here.

The majority concedes its decision is not based on the fighting words doctrine, which "is not the basis of [its] judgment" (p. 19, fn. 11), and states "We need not and do not decide whether this is a fighting words case" (p. 10). The majority recognizes that the fighting words exception to First Amendment protection only exists when an "*actual danger*" of breach of the peace is produced by their utterance (p. 8, italics in original), and that such breach of the peace which must be evoked as a predicate condition of determining if speech constitutes fighting words is an "'immediate'" one, not one which speculatively might occur in the future (id. at p. 7; *Chaplinsky, supra*, 315 U.S. at p. 572; *R. A. V., supra*, 505 U.S. at p. 408 (conc. opn. of White, J. ["imminent violence"]; accord, *Hess v. Indiana* (1973) 414 U.S. 105, 108-109). The trial court, in imposing the initial injunction here, observed that Lawrence's speech had not led to any violence. The trial court rationalized its injunctive order solely on the erroneous ground that Lawrence's future speech could

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[7] One commentator states: "The failure of courts to consider First Amendment principles in harassment cases is understandable, if for no other reason than that defendants seldom raise the issue. Even when courts address the issue, however, they have tended to dismiss it summarily. . . . [¶] . . . [¶] . . . None of [the Supreme Court's] precedents in this area supports the view that the speech at issue in harassment cases is entitled to diminished [First Amendment] protection [on the job]." (Browne, *Title VII As Censorship: Hostile-Environment Harassment and the First Amendment* (1991) 52 Ohio St.L.J. 481, 512-513 (Browne, *Title VII As Censorship*).)

automatically be enjoined because it was subject by statute to punishment by imposition of damages after its utterance--a rationalization endorsed by respondents who labeled the injunctive order "an authorized *statutory* remedy." (Italics added.) In view of the unanimous and compelling federal and state precedent that *content* of speech may not be suppressed, the majority has instead labeled Lawrence's speech as "conduct," the secondary effects of which can be regulated in a "workplace" by the trial court's prior restraint injunction. (P. 13.)

The majority's analysis flies in the face of the federal Supreme Court's squarely contrary holding in *R. A. V., supra*, 505 U.S. at page 394, which *rejected* the claim that the act of burning crosses near people's homes could be banned because such burnings were conduct which would have the "secondary effect" of causing emotional upset to local residents: "St. Paul argues that the ordinance comes within another of the specific exceptions we mentioned, the one that allows content discrimination aimed only at the 'secondary effects' of the speech, see *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). According to St. Paul, the ordinance is intended, 'not to impact on [*sic*] the right of free expression of the accused,' but rather to 'protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against.' [Citation.] Even assuming that an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech, it is clear that the St. Paul ordinance is not directed to secondary effects within the meaning of *Renton*. As we said in *Boos v. Barry*, 485 U.S. 312 (1988), *'Listeners' reactions to speech are not the type of "secondary effects" we referred to in Renton.' Id.*, at 321. *'The emotive impact of speech on its audience is not a "secondary effect."'* [Citations.]" (Italics added.)

As the high court unanimously ruled in *Hurley v. Irish-American Gay Group* (1995) 515 U.S. ___ [132 L. Ed. 2d 487, 504, 115 S. Ct. 2338, 2347-2348] (*Hurley*), the point of the First Amendment "is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." Thus, the *R. A. V.* and *Hurley* decisions have held free speech guarantees protect speakers against the sort of censorship which would be imposed by the injunction the majority suggests the trial court enter on remand.

How then does the majority purport to find support for that proposed injunction? It does so by making two errors. First, it cites other cases which preceded *R. A. V.* and did not deal with prior restraint of free speech. Second, the majority misconstrues language from *R. A. V.* itself which dealt with the subject of "fighting words"--the very issue the majority claims it need not address here, since this case concededly does not concern fighting words.

B. *The Majority Opinion's Two Principal Errors*

1. *Cases Cited for Propositions They Do Not Address*

The first glaring error in the majority's analysis is its citation of several cases allegedly in support of an underlying premise that "Frequent or pervasive workpiace use of racial slurs resulting in an abusive work environment has been held to constitute . . . . conduct . . . *enjoined* under Title VII."[8] (P. 9, italics in original.) The majority proceeds from this premise to the conclusion that such cases deprive nonfighting words of constitutional protection against prior restraint. No appellate decision cited by the majority, however, stands for the premise that free speech rights may be limited by injunctive order, or that the constitutional right to utter speech, free of prior restraint, is subordinate to the employment discrimination provisions of either Title VII or the FEHA. None of these cases even deals with the constitutional issue of prior restraint of speech.

In *Daniels v. Essex Group, Inc.* (7th Cir. 1991) 937 F.2d 1264, 1273-1274 (*Daniels*), no injunction was entered at all; therefore, the court could not have ordered anything "*enjoined*" and no First Amendment issues could have been raised concerning the propriety of any injunctions. In *E.E.O.C. v. Beverage Canners, Inc.* (11th Cir. 1990) 897 F.2d 1067, 1070, the court simply upheld factual findings that a company was responsible for the acts of its employees in subjecting minorities to racially discriminatory fighting words, and there was no discussion of the First Amendment. In *E.E.O.C. v. Goodyear Aerospace Corp.* (9th Cir. 1987) 813 F.2d 1539, 1544, there was likewise no First Amendment issue, and the court simply

[8] Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) bars discrimination in employment, and is the federal counterpart to California's Fair Employment and Housing Act (the FEHA) (Gov. Code, § 12900 et seq.) under which this action was brought.

enjoined the employer to grant an employee a promotion she had already received--an order which may have been futile, but which certainly did not burden any future free speech rights. In *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1518-1519 (*Hacienda Hotel*), there was also no First Amendment issue raised. In *Snell v. Suffolk County* (E.D.N.Y. 1985) 611 F. Supp. 521, 531 (*Snell*), the district court forbade the use of certain specified fighting words in a prison, while noting, "*Here no one has raised the [First Amendment] issue and it would be inappropriate for the court to address it on its own motion.*" (Italics added.) In *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal. 3d 40, 53, there was no injunction against speech and no First Amendment discussion; the high court simply noted that conduct, which in that case included unwanted touching of the breasts and thighs and other indecencies, could be enjoined. No First Amendment issue was raised in the case. The only authority which the majority cites, with a "cf." preceding it, which might arguably support an injunction against speech is an apparent dictum in a decision by a federal district judge, *Robinson v. Jacksonville Shipyards, Inc.* (M.D.Fla. 1991) 760 F. Supp. 1486, 1534-1535 (*Robinson*). That case is inconsistent with the majority's rationale and has been unanimously criticized by legal scholars.[9] None of the majority's cited cases actually held that an injunction against future speech such as the one in issue here is constitutionally permissible under the First Amendment, and none addressed the issue under the

[9] The majority, while citing several law review articles which seem to support an injunctive order, ignores the fact that more recent law review articles written in accord with the majority opinion in *R. A. V., supra*, have demolished the *Robinson* dictum. (See, e.g., Volokh, *Freedom of Speech and Workplace Harassment* (1992) 39 UCLA L.Rev. 1791, 1818 ["Thus, in the recent case of [*Robinson*], the district court was wrong . . . ."]; Browne, *Title VII As Censorship, supra*, 52 Ohio St.L.J. at p. 512, fn. 188 ["Thus, the court in *Robinson* [citation] missed the point . . . ."] & 515, fn. 201 ["The court in *Robinson* [citation] mistakenly asserted . . . ."]; Karner, *Political Speech, Sexual Harassment, and a Captive Workforce* (1995) 83 Cal.L.Rev. 637, 665, fn. 168 ["The *Robinson* court ignored basic [First Amendment] doctrine in reaching this conclusion."].) Further, neither *Robinson* nor any of the other cases cited by the majority analyzed the issue in light of the free speech guarantee of the California Constitution, which is directly applicable here as I discuss, *post*. The case at bench is not a federal case governed by federal law. It is solely a state law case governed by state law, except to the extent the First Amendment to the federal Constitution *also* bars the prior restraint on speech crafted by the trial court and the dicta of the majority opinion.

controlling federal Supreme Court authority of *R. A. V., supra*, which had not been decided in the Supreme Court when the majority's cases were handed down.

2. *The R. A. V. Case Cited for a Proposition It Rejects*

The second error of the majority is found in its curious and erroneous effort to find support for its dicta in *R. A. V.* itself, based on select quotations which turn that decision on its head. The majority says: "The key issue is whether employment discrimination law as applied to racist speech in the workplace is *changed by R. A. V.* . . ." (p. 10, italics added), and erroneously concludes it has.

The holding of *R. A. V.* invalidated as facially unconstitutional a St. Paul ordinance prohibiting display of a symbol which the displayer knows or has reason to know "'arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . .'" (505 U.S. at p. 380.) The Supreme Court of Minnesota, reversing its trial court, had construed the reach of the ordinance to conduct that amounts to "'fighting words'--conduct that itself inflicts injury or tends to incite immediate violence . . . ." (*Matter of Welfare of R.A.V.* (Minn. 1991) 464 N.W.2d 507, 510); and reinstated the charge of violating the ordinance against a juvenile for burning a cross on a Black family's lawn (*id.* at p. 511).

The U.S. Supreme Court majority invalidated the ordinance, as thus construed by the Minnesota Supreme Court (which construction the U.S. Supreme Court accepted), because it imposed special prohibitions on speakers expressing views on disfavored subjects of race, color, creed, religion or gender while permitting displays of abusive invective not addressed to those subjects. (*R. A. V., supra*, 505 U.S. at pp. 393-396.) *R. A. V.* involved no issue of prior restraint of speech in the workplace or elsewhere, but is nonetheless the principal rationale of the majority dicta through its erroneous analysis of another dictum.

Justice Scalia, in his review of First Amendment principles in *R. A. V.*, recognized that all speech produces some secondary effect; and that "'Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton*.' [Citation.] 'The emotive impact of speech on its audience is not a "secondary effect."'" (505 U.S. at p. 394.) The high court also reviewed the authorities which have "permitted restrictions upon the content of speech in a *few limited areas*, . . . [i.e.,] *traditional limitations*," because the social value of

such speech as a step to truth is clearly outweighed by the social interest in order and morality, citing *Chaplinsky, supra* (see fn. 4, *ante*), but cautioning that "a *limited* categorical approach has remained an important part of our First Amendment jurisprudence." (*R. A. V., supra*, 505 U.S. at pp. 382-383, italics added.)

As an example of the limited types of speech which the Supreme Court has thus categorically regulated, but with *no* discussion of prior restraint of speech, Justice Scalia cited "'fighting words'" as defined by *Chaplinsky*, and discussed their "'secondary effects'" which deprive such fighting words of First Amendment protection, i.e., because they convey an overriding message of personal injury and imminent violence. (*R. A. V., supra*, 505 U.S. at pp. 383-384, 388-389; see fn. 25, *post*.) In illustrating this principle, Justice Scalia said: "Thus, for example, *sexually derogatory 'fighting words,' among other words*, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices [citation]." (*R. A. V., supra*, 505 U.S. at p. 389, italics added.)

The majority's purported reliance on *R. A. V.* to support its dicta is based on those emphasized words:"By including the phrase 'among other words,' *R. A. V.* expanded its statement on the secondary effects rule beyond categories of proscribable speech to encompass any speech that creates an abusive work environment violating the law of employment discrimination." (Maj. opn., *ante*, at p. 947, italics in original.) This is patently incorrect.

This *R. A. V.* majority's dictum above quoted simply states a truism, that "other words," i.e., words which are not "'fighting words,'" *may* produce a violation of the prohibition of Title VII against sexual discrimination in employment.[10] I reemphasize that we do not deal in this case with liability for damages, but with suppression by prior restraint of free speech. Neither this dictum nor any of the *R. A. V.* opinions deals with issues of prior restraint of speech or in any way validate the majority's dicta. *R. A. V.* is a fighting words case that does not change or purport to extend the Supreme Court's traditional limitations on constitutional free speech protections. Nor does *R. A. V.* allow prior restraint of workplace speech which does not constitute fighting words. In fact, it held the

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[10] For example, the odious words, "You will have to have sex with me to get that promotion," are not fighting words; but they certainly "may produce" a violation of Title VII. (See *Karibian v. Columbia University* (2d Cir. 1994) 14 F.3d 773, 778.)

opposite: Regardless of the site of the speech, the government may not regulate speech which does not constitute "fighting words." (See *Sebago, supra*, 211 Cal. App. 3d at pp. 1382-1385; see also *Thornhill v. Alabama* (1940) 310 U.S. 88, 94-96, 104-105 [The imposition of prior restraint on speech at a place of employment was constitutionally overbroad, even though the prior restraint was aimed at suppressing secondary effects such as industrial strife.]; *Forsyth County v. Nationalist Movement* (1992) 505 U.S. 123, 134, 120 L. Ed. 2d 101, 112 S. Ct. 2395 [The court overturned a prior restraint on racist speech, even though the restraint was "aimed only at a secondary effect--the cost of maintaining public order."].)

The majority, thus, reaches its result by a fallacious route. First, the majority reasons that under the federal Constitution fighting words, including sexually or racially derogatory fighting words, may be suppressed. The majority also reasons that fighting words have the secondary effect of causing upset to some listeners. Therefore, the majority reasons inexplicably that any *nonfighting* words may be suppressed if they have a "secondary effect" of arousing reactions in the listeners which arguably create a discriminatory work environment.

The fallacy of this illogic is obvious. It accomplishes exactly what Professor Matsuda recommends, although she, unlike the majority, understood that her recommendation "ultimately weakens" First Amendment protection. (Matsuda, *Racist Speech, supra*, 87 Mich.L.Rev. at p. 2357; see fn. 5, *ante*.)

The majority dicta would "stretch" traditional limitations on First Amendment protection for fighting words to eliminate the same protection against prior restraint of nonfighting words. It further adopts Matsuda's recommended "stretch" of the "'content/conduct'" rationale of First Amendment jurisprudence by converting nonfighting words speech in a place of employment to conduct deprived of First Amendment protection and suppressible by a prior restraint order. (*Matsuda, Racist Speech, supra*, 87 Mich.L.Rev. at p. 2357; see fn. 5, *ante*.)

This view is founded in part on the error of the trial court (see section IV, *post*) which the majority perpetuates: that speech in a place of employment for which damages may be later imposed under statute is automatically enjoinable *for that reason* by an order of prior restraint.

This is a "stretch" too far.

Punishment for and suppression of speech are two very different things. (*Kunz, supra*, 340 U.S. at pp. 294-295.) Prior restraints on speech have been rejected routinely by courts of California and the U.S. Supreme Court as disfavored, offensive, and constitutionally proscribed. (*Pines v. Tomson* (1984) 160 Cal. App. 3d 370, 395-398 (*Pines*); *Near v. Minnesota* (1931) 283 U.S. 697, 713; *Collin v. Smith* (N.D.Ill. 1978) 447 F. Supp. 676, 699, affd. (7th Cir. 1978) 578 F.2d 1197, cert. den. 439 U.S. 916 (Collin).)

The *R. A. V.* majority's discussion with approval of "traditional limitations" in a "few limited areas" on the protection of free speech (505 U.S. at p. 383), which preceded the "other words" dictum (*id* at p. 389) on which the majority here leans, demonstrates only that those traditional limitations remain in force. The *R. A. V.* majority certainly displayed no intention of departing from such "few limited areas" and depriving nonfighting words sub silentio of First Amendment protection against suppression of speech by prior restraint.

Federal and state courts considering *R. A. V.* and its application to the workplace do not accord with the majority's conclusion that Title VII (and by logical extension, the FEHA) overrules First Amendment rights in the workplace.

As Circuit Judge Edith H. Jones forthrightly put it, while striking down a somewhat similar order aimed at workplace speech which had been viewed as hostile to women and therefore as constituting harassment under Title VII: "Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech. [Citations.]" (*DeAngelis v. El Paso Mun. Police Officers Ass'n* (5th Cir. 1995) 51 F.3d 591, 596-597, fn. omitted, cert. den. ___ U.S. ___ [133 L. Ed. 2d 403, 116 S. Ct. 473] (*DeAngelis*).)

Even more significantly, the Fifth Circuit in *DeAngelis* specifically rejected the rationale which the majority urges in the present case for suppressing free speech, when it has secondary effects in the working environment: "*The [federal Supreme] Court's pronouncement in R.A.V., that 'sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices'*

does not mean that Title VII trumps First Amendment speech rights." (51 F.3d at p. 597, fn. 7, italics added.)

Further, as the Central District of California recently ruled, in striking down a similar workplace restriction on free speech rights which had been imposed in order to free the working environment of discriminatory "'sex-role stereotyping'": "The defendants' effort to regulate the behavior of male fire fighters by regulating the material which they may read is categorically impermissible. It is a fundamental principle of First Amendment law that the government cannot regulate material in order to prevent the readers from developing certain ideas. *See, e.g., American Booksellers Ass'n*, [*Inc. v. Hudnut* (7th Cir. 1985), 771 F.2d 323, affd., 475 U.S. 1001]. Such regulations are attempts at altering the reader's viewpoint, and as such are the most disfavored of all regulations touching upon the First Amendment. *See R.A.V.* [*supra*, 505 U.S. 377]." (*Johnson v. County of Los Angeles Fire Dept.* (C.D.Cal. 1994) 865 F. Supp. 1430, 1441.)[11]

The majority also cannot justify restraining free speech merely because it wishes to combat discrimination against protected classes. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." (*Hurley, supra*, 132 L. Ed. 2d at p. 507, 115 S. Ct. at p. 2350.)

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[11] The majority's protestations that it is only attempting to regulate secondary effects, not suppress the content of the speech in question, do not withstand the most cursory analysis. If the trial court had banned expressions of racial harmony on the job because those expressions caused upset to Lawrence, such a suppression of speech due to its content and emotional effect could not pass constitutional muster. The trial court's injunction was intended to suppress certain speech. It was not concerned with secondary effects such as the avoidance of emotional upset. Even the majority's specific references to the fact that free speech can "poison[] the atmosphere" at work (p. 16) show that under the injunction, even as the majority has suggested it might be revised, Lawrence can cause upset to other workers by any means he desires, *except* by exercising his free speech rights in a way with which the majority disagrees. That is clearly unconstitutional. (*R. A. V., supra*, 505 U.S. at pp. 393-394.) "If this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective." (*Hurley, supra*, 132 L. Ed. 2d at p. 507, 115 S. Ct. at p. 2350.)

C. *The Injunction Is Facially Unconstitutional*

The injunction the trial court has fashioned is invalid on the independent ground that it, like the St. Paul ordinance in *R. A. V.*, is facially unconstitutional.

R. A. V. held that the St. Paul ordinance was facially unconstitutional because it applied to displays amounting only to fighting words that insult or provoke violence on the basis of race, color, creed, religion, or gender, while displays amounting to fighting words containing other abusive invective, no matter how vicious or severe, are permissible unless addressed to one of those topics. (505 U.S. at p. 391.)

Here the injunction suffers from the same facial unconstitutional deficiencies. It is aimed at suppressing a category of speech that insults respondents or affects their workplace on the basis of race--which the majority describes as "racist epithets" (p. 11)--that would not necessarily constitute fighting words and did not constitute them here.

As Justice White stated in concurring in the *R. A. V.* judgment: "Although the ordinance as construed [by the Minnesota Supreme Court] reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that--however repugnant--is shielded by the First Amendment." (505 U.S. at pp. 413-414.)

Assuming, arguendo, that the trial court's injunction could be construed only to apply, as it constitutionally must, to fighting words which are also "racist epithets," it would nonetheless be facially unconstitutional under both majority and minority opinions of *R. A. V.*

"The First Amendment does not permit [the court] to impose special prohibitions on those speakers who express views on disfavored subjects." (*R. A. V., supra*, 505 U.S. at p. 391.)

D. *The Implications of the Majority Opinion's Censorship of Speech*

The implications of the majority dicta are staggering. If the majority is correct, the millions of Californians who are daily employed in a "workplace" can be exposed to imprisonment for contempt if they violate a court order restraining them from uttering any speech that conveys to the recipient listener no overriding

message of personal injury and imminent violence (*Chaplinsky, supra*, 315 U.S. at p. 572), simply because their speech might produce an adverse "emotive impact" (*Boos v. Barry* (1988) 485 U.S. 312, 321, 99 L. Ed. 2d 333, 108 S. Ct. 1157). First Amendment protection against prior restraint of speech which does not constitute fighting words is eliminated. The majority reaches that result by this means. It transforms and expands Justice Scalia's dictum, that Title VII may be violated by (other nonfighting) words which sexually harass, into a very different holding that nonfighting words which harass in a place of work may be controlled by an order of prior restraint. It then suggests that nonfighting words may be enjoined by an order of prior restraint, in a place of employment, in purported reliance on inapposite precedent.

Neither of these positions withstands analysis, and the majority opinion candidly states the obvious policy it thereby pursues and reaches. As an intermediate appellate state court, it is indicating for the first time, albeit in dicta, that speech in a place of employment, offering no overriding threat or message of personal injury and imminent violence, is not entitled to First Amendment protection against suppression by a government order imposing prior restraint; and that this is so because the qualitatively different content of that speech converts it to conduct subject to prior restraint regulation under the narrow secondary effects doctrine of the United States Supreme Court's First Amendment jurisprudence. The Supreme Court has *never* so ruled. It is clear, moreover, under governing federal precedents that "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." (*Rosenberger v. Univ. of Virginia* (1995) 515 U.S. ___ [132 L. Ed. 2d 700, 715; 115 S. Ct. 2510, 2516.].)

The irony of the majority's dilemma is patent. It attempts to transform *R. A. V.*, which gave First Amendment protection to racists expressing a morally offensive ideology by burning a cross on a Black family's lawn (conduct much more odious and offensive than the rude comments here at issue), into a holding that much milder, nonfighting words in a place of employment are entitled to no such protection.

The law review article by Professor Matsuda (see fn. 5, *ante*) appears to be the true source of the majority's analysis despite its

contrary disclaimer (maj. opn., *ante* at p. 37, fn. 6).[12] The majority has further relied upon authorities citing this article. *Daniels, supra*, 937 F.2d at page 1273 is cited by the majority for the proposition that racially degrading speech is "actionable" (p. 9) even though there was no injunction entered in that case, so the First Amendment issues were not addressed, and the case does not stand for any relevant proposition. The *Daniels* case cites Matsuda's article in a footnote, but the court did not purport to enact her proposal for legal reform.

Likewise, a law review article which consists of a speech given by Justice Stevens[13] (Stevens, The *Freedom of Speech* (1993) 102 Yale L.J. 1293, 1311-1312 (Stevens, *Freedom of Speech*)) also cites Matsuda's proposal for legal reform, and the majority cites the latter article as well (p. 8). Justice Stevens, however, did not indicate Matsuda's proposal embodies existing law or that it should be adopted. Rather, his ruminations only indicated that while we should be willing to consider the viewpoint of persons who hear "intolerant" speech they find offensive, such speech--as opposed to threatening conduct--should clearly remain protected by the First Amendment. (Stevens, *Freedom of Speech, supra*, at. p. 1313.)

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[12] The article, inter alia, also proposed that courts should change their analysis of the First Amendment so that "degrading" speech by Whites could be banned, although verbal racial attacks by members of other groups directed at Whites would remain "permissible" (Matsuda, *Racist Speech, supra*, 87 Mich.L.Rev. at p. 2358); and that the existing interpretation of the First Amendment should be changed, so that it would protect "Marxist speech" but not racists (*id.* at pp. 2358-2359). This is not, however, presented as existing legal doctrine; rather, the author recognizes that she is proposing a radical restructuring of the existing understanding and application of First Amendment protections. The majority comments on my criticism of the views of Professor Matsuda, contending it has sidestepped them entirely by merely noting the existence of "debate" on the subject of whether the First Amendment protects free speech rights in places of employment. (Maj. opn., *ante*, at p. 942, fn. 6.) My criticism is focused on the plain fact that the majority's unprecedented stretching of traditional and long-standing exceptions to First Amendment protection of speech in this case has accomplished exactly what Professor Matsuda recommends.

[13] Justice Stevens wrote separately in R. A. V., concurring in the result. (505 U.S. at pp. 416-436.)

Many legal scholars have strongly disagreed with, and in some cases disparaged, Matsuda's far-reaching proposal for racially based suppression of free speech rigts.[14]

That proposal has never been adopted by any court before the majority opinion erroneously does so; and its statements in dicta, adopting Matsuda's theory of stretching classic First Amendment treatment of the fighting words and content/conduct doctrines, is wholly contrary to the main tradition of First Amendment authorities and scholarship.[15]

Quite recently, in *Hurley*, the United States Supreme Court reaffirmed, by a unanimous vote, the primacy of First Amendment rights when it overturned a state court injunction which burdened free speech by mandating that a parade include a certain group which sought inclusion under a state anti-discrimination law. "We hold that such a mandate violates the First Amendment." (*Id.*, 132 L. Ed. 2d at p. 495, 115 S. Ct. at p. 2341.) Although a restriction on free speech might ostensibly serve a worthy governmental purpose (as Matsuda suggests), that is insufficient to support the restriction: "While the law is free to promote all sorts of conduct in place of harmful

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[14] See, e.g., Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma* (1991) 32 William & Mary Law Review 211, 242 (Massaro, *Hate Speech*) ["In effect, the Matsuda approach makes the criminality of speech hinge on the race of the speaker and the victim."]; Browne, *Title VII As Censorship, supra*, 52 Ohio State Law Journal at page 534 ["One highly unsatisfactory response to first amendment objections is simply to label racist speech sui generis and declare that normal rules do not apply. Mari Matsuda makes such an argument . . . . The flaws in her argument are manifest."]; Post, *Racist Speech, Democracy, and the First Amendment* (1991) 32 William & Mary Law Review 267, 308-309 ["There is also a tendency in recent literature to move from the proposition that a fair determination cannot be made unless 'the victims of racist speech are heard,' to the very different proposition that such a determination ought to use 'the experience of victim-group members [as] a guide.' [Quoting Matsuda, *Racist Speech*.] The latter proposition seems to me plainly false."].

[15] The majority's disclaimer (p. 8, fn. 6) of endorsement of the view of Matsuda and authors supporting her position seems belied by its result and its implicit criticism of the traditional fighting words jurisprudence of the U.S. Supreme Court. "The curious result is that the [fighting words] doctrine protects those who are likely to react with violence, but not those who are too fearful to fight back. . . . Victims of racist speech are frequently too intimidated to react with violence . . . . Thus, racist invective is often beyond the reach of the fighting words doctrine." (Maj. opn., *ante*, at p. 943, fn. omitted.) If the words in question are not fighting words, however, they are protected by the First Amendment.

behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." (*Id.*, 132 L. Ed. 2d at p. 507, 115 S. Ct. at p. 2350.)

II *California's Constitution Is Violated by the Trial Court's Injunction*

The California free speech guarantee is even broader than the federal one. Article I, section 2, subdivision (a) of the California Constitution provides: "*Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right.* A law may not restrain or abridge liberty of speech or press." (Italics added.)

The trial court's order restraining free speech is inconsistent with the plain meaning of this free speech guarantee, and is inconsistent with the prior precedents of our state Supreme Court interpreting this guarantee. "The wording of this section is terse and vigorous, and its meaning so plain that *construction is not needed.* The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. *He shall have no censor over him to whom he must apply for permission to speak*, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes." (Dailey *v. Superior Court* (1896) 112 Cal. 94, 97 (*Dailey*), italics added.) Thus, the state free speech guarantee prevents a court from enjoining speech producing emotive impacts in others prior to utterance, although it does not preclude damage suits therefor, as this case where three damage verdicts were returned clearly illustrates.[16]

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[16] The wording of article I, section 2, subdivision (a) of the California Constitution was chosen by the delegates to the Monterey Convention in 1849, and ultimately derives from Justice Blackstone's Commentaries. (See *Dailey, supra*, 112 Cal. at p. 98.) As Blackstone notes and the *Dailey* court held, this provision forbids prior restraint or censorship, even by judges, because such a prior restraint would "'subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. . . .'" (*Ibid.*)

As interpreted by our own high court and the federal Supreme Court, this state guarantee is even stronger and more definitive as a bar against prior restraints on speech than the federal guarantee. (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal. 3d 899, 908-910, *affd.* (1980) 447 U.S. 74; accord, *Wilson v. Superior Court* (1975) 13 Cal. 3d 652, 658 ["A protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press."].) The state constitutional right of free speech does not allow the prior restraint on speech which is being applied here. (See *Pines, supra*, 160 Cal. App. 3d at pp. 395-398 [An injunction forbidding expression of sentiments, deemed discriminatory against non-Christians, was held invalid under the California Constitution.].)[17]

No California appellate court has ever held, in light of the express wording of the free speech guarantee of our state Constitution, that persons can be subjected to prior restraint on speech, and legally forbidden to speak on pain of fine or being sent to jail, for merely making rude or even immoral comments which might have bad effects on the listener. All existing authority under the California Constitution is to the contrary:"No one's mouth may be closed in advance, as sought herein, for the purpose of preventing an utterance of his sentiments, however mischievous the prospective results of such utterance." (*People v. American Automobile Ins. Co.* (1955) 132 Cal. App. 2d 317, 326.) The trial court, however, created, and the majority suggests it may recreate, an injunction which would send a person to jail for exercising the free speech rights guaranteed

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[17] We have seen that the federal Supreme Court has previously stated fighting words are not protected by the First Amendment, as to after-the-fact punishment therefor. However, since this exception to the First Amendment was articulated in *Chaplinsky, supra*, no decision of the federal high court has ever upheld a prior restraint on speech, whether on the grounds that it constituted fighting words, or conduct. (See *Procter & Gamble, supra*, 78 F.3d at p. 227.) There is an even more serious question as to whether any speech may be subject to prior restraint under the broader free speech guarantee of the California Constitution. The *Dailey* case strongly suggests it may not. (See 112 Cal. at p. 97.) We need not decide the issue in this case, because the injunction is being reversed, and the words used were not fighting words in any event.

against exactly this sort of prior restraint by the California Constitution.[18]

More recently, Division Three of this district recognized that a trial court order could not be issued which would constitute a prior restraint on rude personal comments, even though the speech in question was allegedly offensive to adult listeners and indirectly harmful to children. (*In re Marriage of Candiotti* (1995) 34 Cal. App. 4th 718, 725-726 (*Candiotti*).) "Such remarks by Debra may be rude and unkind. They may be motivated by hostility. To the extent they are libelous, they may be actionable. But they are too attenuated from conduct directly affecting the children to support a prior restraint on Debra's constitutional right to utter them." (*Id.* at p. 726, fn. omitted.)

The majority does not, and I believe cannot, explain how the even stronger free speech guarantee of the California Constitution--which has no narrow exception for secondary effects as a result of the expression of "sentiments," odious as they may be to the majority and myself--can allow such prior restraint.[19] We know from *Pines,*

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[18] By section 52.1, subdivision (k) of the Civil Code, the Legislature has clearly endorsed the principle that pure speech may not be the subject of prior restraint even through the speech is discriminatory. That subdivision provides that no such injunctive order "shall restrict the content of any person's speech." (*Ibid.*) The trial court's injunction creates the same result the Legislature proscribed.

[19] The majority wrongly relies on *Lopez v. Tulare Joint Union High School Dist.* (1995) 34 Cal. App. 4th 1302, 1325 (*Lopez*), which held that high school authorities could remove the four letter words from a dramatic production, but could not censor the underlying ideas. First, as *Lopez* was careful to note, its holding applied only to a drama to be presented to minors, not adults, in light of the greater need for supervision of language aimed at minors. (*Ibid.*) Where the intended audience is composed of *adults*, such as the workers at Avis, the California courts have held that racial slurs or other objectionable material may not be censored by state authorities or the courts. (See *Dailey, supra*, 112 Cal. at pp. 96-97 [A dramatic production may not be suppressed, even though it refers to a scandalous ongoing murder case.]; *DiBona v. Matthews* (1990) 220 Cal. App. 3d 1329, 1335-1336, 1343, 1345-1348 [School authorities could not censor racial slurs in a play presented to adult students at a college, even though some members of the "'community'" objected to this racially derogatory language.].) Further, *Lopez* also was careful to note that it was not censoring the underlying message, content, or viewpoint of the students, only their use of certain impolite words which other young students might find embarrassing, given their sexual and emotional inexperience. (34 Cal. App. 4th at p. 1325.) The same cannot be said for the injunction in issue here or the one the

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supra, that no such exception for secondary effects from discrimination exists under California constitutional law. (160 Cal. App. 3d at pp. 395-398.) The present case is governed by the California Constitution, as well as the federal Constitution; and if *either* Constitution forbids entry of the injunction here, it must be vacated. California's Constitution does so.

IV *Our Independent Review of the Record in Cases Implicating Free Speech Must Establish That the Injunction: (1) Is Narrowly Tailored to Preserve Free Speech Rights, and (2) Is Justified by Compelling Necessity; the Injunction at Issue Fails Both Tests*

A. *Our Duty of Independent Review*

Where free speech rights are at stake, we must independently review the trial court's findings and the record in order to ensure that any injunction is narrowly tailored and justified by compelling necessity. Proof of a violation of the FEHA does not automatically trigger the granting of injunctive relief as respondents urged below and the trial court appears to have believed.[20] "In the review of state

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[19](...continued)
majority suggests the trial court may reissue, both of which necessarily would seek to ban any message, content, or viewpoint of which the state authorities disapprove, regardless of the specific language employed. Finally, the need to protect tender ears from impolite language is inapposite here, and is being seized upon simply as a pretext for censorship of the expression of unpopular views--a prior restraint which is not constitutionally permissible. (*Dailey, supra*, 112 Cal. at p. 97; *Candiotti, supra*, 34 Cal. App. 4th at pp. 725-726 [The alleged need to protect minors may not be used to censor speech intended for adults.]; accord, *Sebago, supra*, 211 Cal. App. 3d at pp. 1382-1385.)

[20] The lower court apparently accepted respondents' argument that an injunctive order was "an authorized statutory remedy" pursuant to the FEHA, having observed that "[Lawrence] is saying things which are prohibited by the [FEHA] statute . . . ." In the injunctive hearing, respondents argued "It's [Government Code section 12965, subdivision] (c) which gives the court the authority to grant that type of [injunctive] relief." The "statutory remedies" the FEHA sets forth are *not* descriptive of remedies applied by courts. When a case such as this is heard and decided by a court, the ordinary rules applicable to civil actions generally apply. (See *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal. 3d 211, 221 [Trial courts in FEHA actions may provide "all relief generally available in noncontractual actions . . . ."].) Moreover, it was never intended that the FEHA should be applied so as to infringe
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[court] decisions where First Amendment rights are drawn into question, we of course make an examination of the evidence to ascertain independently whether the right has been violated." (*Feiner v. New York* (1951) 340 U.S. 315, 316.) Our "constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court" (*Hurley, supra*, 132 L. Ed. 2d at p. 499, 115 S. Ct. at p. 2344) is applicable to appellate review under the California Constitution's free speech provision as well (*Katzev v. County of Los Angeles* (1959) 52 Cal. 2d 360, 365-366).

Such independent review is required even though the proposed restriction on speech might serve worthy governmental goals, such as the avoidance of hurtful and crude expressions, or the fostering of racial harmony. The relevant principles were lucidly stated by Justice Newsom of this district: "Thus, although the governmental purpose be legitimate and substantial, such purpose may not be achieved 'by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved . . . .' [Citations.] . . . Regulations affecting protected First Amendment activities must be justified by something more than 'mere legislative preferences or beliefs respecting matters of public convenience' [citation] and are constitutionally permissible 'only if they are clearly and narrowly drawn to avoid arbitrary and unnecessary curtailment of freedom of speech . . . .' [Citation.] *The burden of establishing whether the regulation in question is sufficiently narrowly drawn in serving a compelling state interest is placed upon the government seeking to impose the regulation.* [Citations.] *Moreover, when First Amendment rights are at issue, a reviewing court must make an independent examination of the whole record in order to determine whether that burden has been satisfactorily met.*" (*Sussli v. City of San Mateo* (1981) 120 Cal. App. 3d 1, 9 italics added (*Sussli*).) Here an injunctive order of prior restraint on the exercise of free speech was entered on a record of the injunctive hearing which is clearly insufficient to support the burden *Sussli* and its antecedents require.

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[20](...continued)
free speech rights. (See Cal. Code of Regs., tit. 2, § 7287.6, subd. (b)(1)(E) ["*In applying this subsection [forbidding harassment], the rights of free speech and association shall be accommodated consistently with the intent of this subsection.*" *Italics added.*].)

Under the federal constitution, "we are obliged to make a fresh examination of crucial facts." (*Hurley, supra*, 132 L. Ed. 2d at p. 500, 115 S. Ct. at p. 2344.) In performing this independent constitutional duty to apply a heavy burden to those attempting to restrain speech, we must determine by independent examination of the trial court's findings "whether that burden has been satisfactorily met." (*Sussli, supra*, 120 Cal. App. 3d at p. 9.) This is required because respondents, not appellants, have the burden to justify an injunction constituting a prior restraint on free speech, even one which was content-neutral (unlike the present injunction), by showing that it was narrowly tailored to protect free speech rights. (*Madsen v. Women's Health Center* (1994) 512 U.S. ___ [129 L. Ed. 2d 593, 608; 114 S. Ct. 2516, 2524-2525] (*Madsen*).) Appellants are entitled to contend (as they do) and we to decide whether the trial court's injunction language, or that implicitly suggested by the majority's remand, is constitutionally permissible. This implicates, inter alia, issues of overbreadth, enforceability, vagueness, and imposition of prior restraint on speech.

B. *Respondents Have Not Carried Their Burden to Prove the Need for Injunctive Relief Suppressing Free Speech*

The full record of the injunction hearing shows no trial court findings which would support the issuance of the injunction. The trial court never found that the words it was seeking to enjoin were "fighting words" which might constitutionally be subject to suppression, and respondents and the majority do not contend otherwise. The trial court never found any ongoing conduct necessitating an injunctive order, or that Lawrence's speech years before the injunctive hearing established the "basic requisites of the issuance of equitable relief in these circumstances--the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law," i.e., in damages. (*O'Shea v. Littleton* (1974) 414 U.S. 488, 502.)[21] Rather, the trial court simply believed it automatically had the power to issue an injunction restraining free speech, merely because damages had been awarded to three of the seventeen plaintiffs for emotional distress; that the time for

[21] The trial court's statement--that if Lawrence had not harassed anyone from 1992 "to the present, that may be because of the pending action"--tacitly concedes an adequate remedy at law.

considering the First Amendment issue its injunction raised would have to wait the day when Lawrence was tried by a jury for "indirect contempt" for violating it;[22] and that the injunction was authorized to prevent "repetitive" or a "multiplicity of" torts. All of these premises are so patently erroneous that the majority makes no effort to defend or adopt them. The law is obviously to the contrary. (See *Los Angeles v. Lyons* (1983) 461 U.S. 95, 107, fn. 8 [An injunction barring possible future discrimination is improper: "The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant."]; *Harrisonville v. Dickey Clay Co.* (1933) 289 U.S. 334, 337-338 ["An injunction is not a remedy which issues as of course."]; *Kunz, supra*, 340 U.S. at pp. 294-295 [Past disorder in religious meetings does not support a present order enjoining them:"The court below [as did the trial court here] has mistakenly derived support for its conclusion from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. . . . We are here concerned with suppression--not punishment."].)

The majority first presumes the "factual underpinnings" of the "injunctive portions" of the trial court's judgment are "conclusively" established from the lack of a trial record and respondents' appellate argument. (P. 5.) Thus, it reasons, we must further conclusively presume in support of the injunction that Lawrence delivered a "steady barrage of opprobrious racial comment" to three or four respondents, citing language which the court used in *Johnson v. Bunny Bread Co.* (8th Cir. 1981) 646 F.2d 1250, 1257 to describe Title VII violations meriting after-the-fact punishment. *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17 [126 L. Ed. 2d 295, 301, 114 S. Ct. 367, 370] (*Harris*), cited by the majority in this connection, was not posited on, did not discuss, and is inapposite to the issue we face--First Amendment protection of nonfighting words speech from prior restraint. The *Harris* citation is consistent with the majority's repeated failure to clearly observe the distinction between those cases, including *Harris*, which deal with *punishment or award*

[22] One will search the authorities in vain to find support for this unprecedented proposition: that an order of prior restraint on speech cannot be "prematurely" tested for constitutional error until the recipient of that order comes to trial accused of violating it.

of damages for speech after it is *uttered* and those authorities which proscribe restraint of that speech *before* it is uttered.

Having thus rationalized the existence of nonevidentiary "underpinnings" allegedly supporting the trial court's injunction, the majority then reverses the very injunction it said was supported by those presumed "underpinnings." In sum, the record and "underpinnings" before us will simply never support suppression of free speech by injunction, because the speech in question was protected by the First Amendment.

Respondents and the majority have not carried their burden of demonstrating that either the trial court's injunction, which the majority has discarded, or any other injunction framed in accord with the majority's dicta is narrowly drawn to serve a compelling state interest. The injunction is not narrowly tailored to target only the limited types of speech which can constitutionally be restrained. No injunction is justified here by a compelling necessity, in light of the fact that (1) there has been no finding of any illegal or objectionable speech for years; (2) there are other remedies at law available for verbal harassment; (3) and there has been no finding of any ongoing harassment of anyone. Even assuming, arguendo, that there could ever be a compelling state interest allowing the prior restraint of rude words or racially derogatory insults, it ended years previously and the injunction is improper. (See *Madsen, supra*, 129 L. Ed. 2d at p. 608, 114 S. Ct. at pp. 2524-2525.)[23]

In light of the protected constitutional status given to free speech rights as against prior restraints, the trial court certainly had no broader injunctive power in restraining speech here than it has under Code of Civil Procedure section 526 generally, proscribing the issuance of an injunction when there is no present demonstrated need for one. An applicant for a normal injunction, restraining for instance a trespass across the applicant's land, would be laughed out of court if the record disclosed the most recent trespass had occurred years previously, with no record of any recurrence. (See, e.g., *Hannah v.*

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[23] The majority's statement, that the paucity of our record compels us blindly to presume conclusively that the trial court's findings are supported by the evidence, is simply untrue. (P. 5.) The majority's presumption of the trial court's alleged reliance on the evidence *at trial* for entering an injunction on that basis does not preclude this court from examining de novo the *need* for the injunction from the same court's concessions and omissions on our record.

Pogue (1944) 23 Cal. 2d 849, 858 [An injunction against taking dirt and branches from plaintiff's land was properly dissolved on appeal, where the record showed the takings had occurred on an occasional basis years previously and then ceased: "There was evidence that on two occasions defendant Pogue took dirt and branches. There was no evidence that he intended to continue doing so."]; *Gleaves v. Waters* (1985) 175 Cal. App. 3d 413, 417 [Injunctive relief against trespass across property in order to spray for infestations of "Japanese beetle" was properly denied, where there was no showing of a future danger of illegal conduct.].) Free speech rights are entitled to no less protection.

C. *The Injunction at Issue Here Was Not Narrowly Tailored to Preserve the Right of Free Speech*

As this case demonstrates, our society is enlightened enough to provide for the recovery of damages for conduct amounting to racial or sexual discrimination, or harassment. However, the trial court did not grant an injunction only against the use of "fighting words," not based upon hostility or favoritism toward the message Lawrence imparted.

The trial court and the majority, however, have ignored this concept, and neither has narrowly tailored its respective attempts at suppression so as to forbid only fighting words, without regard to the viewpoint or content expressed by those words. The federal Constitution may arguably allow prior restraint against fighting words, but does not allow a viewpoint-based discrimination which would allow the government to ban, for instance, only those fighting words which criticized the government, or expressed a particular viewpoint. (See *R. A. V. supra*, 505 U.S. at p. 386.) "As with the sound truck, however, so also with fighting words: *The government may not regulate use based on hostility--or favoritism--toward[] the underlying message expressed.*" (*Ibid.*, italics added.) *R. A. V., supra*, proscribes a ban on fighting words as a subterfuge to ban only speech which is not politically correct: "St. Paul has not singled out an especially offensive mode of expression--it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate [only] messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city

is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid . . . ." (Pp. 393-394.)

It is certainly not true, as the majority suggests, that racist speech must necessarily be tolerated if no injunction issues. Speech may be subject to sanctions after the fact, as it was here by damages awarded to three respondents, although it may not be suppressed by prior restraint. The law of slander is a good example. The First Amendment bars the suppression of speech by prior restraint, but does not bar the imposition of damages after the fact for slanderous statements causing damage. Likewise, certain conduct such as disturbing the peace by speech might be subject to criminal penalties after the fact, even though not subject to prior restraint.

Although the majority admits its dicta supporting imposition of prior restraint on free speech are unprecedented, it nevertheless suggests the California Legislature is responsible therefor because the majority claims the Legislature supposedly desired the speech at issue here to be suppressed by enactment of the FEHA. (Maj. opn., *ante*, at p. 24.) The majority points to no enactment by the Legislature purporting to repeal or bypass the First Amendment to the Federal Constitution or article I, section 2, subdivision (a) of the California Constitution. The Legislature did not and could not do so. As Justice Mosk has noted, "Constitutional questions are not determined by a consensus of current public opinion." (*Parr v. Municipal Court* (1971) 3 Cal. 3d 861, 870.)[24] The cases are legion in holding that no legislative enactment can violate or supersede any constitutional provisions, including suppression of free speech under the First Amendment or its broader California equivalent. (See, e.g., *Sebago, supra*, 211 Cal. App. 3d at pp. 1382-1385.)

"The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to

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[24] It is especially troubling in this regard to find the majority relying on a quotation from a newspaper article, not the evidence in the record, in framing its dicta. (P. 6, fn. 5.) This court (Division Five) has strongly condemned the practice of relying on newspaper articles, rather than on the appellate record, for evidentiary purposes. (*Rains v. Belshe* (1995) 32 Cal. App. 4th 157, 183, fn. 6.) Our Supreme Court has also condemned such practices. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal. 4th 1057, 1063-1065.)

nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain anti-thesis."(*Hurley, supra*, 132 L. Ed. 2d at p. 507, 115 S. Ct. at p. 2350.) The injunction of the trial court and the majority's dicta clearly fail this legal test as well. (See *DeAngelis, supra*, 51 F.3d at p. 597, fn. 7.)

V. *The Trial Court's Erroneous Injunction Should Simply Be Vacated As Unconstitutional*

A. *The Overbroad Language of the Trial Court's Injunction and the Majority's Dicta, Imposing Potential Vicarious Liability on an Employer for Not Suppressing an Employee's Speech, Are Both Ineffective as a Remedy and Unconstitutional*

Neither the injunction of the trial court nor the dicta of the majority's opinion prevents Lawrence from using only fighting words and, thus, they are unconstitutionally overbroad.[25] Moreover, the injunction is further unconstitutional in that it makes Avis, a corporation, punishable by contempt merely because one of its

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[25] The trial court implicitly noted that the injunction in issue here could not be based upon the regulation of fighting words, because there was no showing Lawrence had uttered any fighting words and there was no showing violence might result if his utterances were not enjoined. As the trial court conceded at the time it entered the injunction, "But they [the words in question] haven't led to violence, have they? [¶] . . . [¶] . . . I hadn't given that any thought." Moreover, the lamentable word "'motherfuckers'" which Lawrence had apparently uttered is not a racial epithet and is, unfortunately, in relatively common use in today's society. (See, e.g., *People v. Davison* (1995) 32 Cal. App. 4th 206, 210 [Quoting a robbery victim who exclaimed to her assailants, "'"You goddamn motherfuckers, give me back my money."'"].) The sporadic use of such a word to express anger or emotional upset does not justify the issuance of an unconstitutional prior restraint on speech. Respondents conceded at oral argument that "'motherfuckers'" is not a fighting word; and it was not used here in a threat or scheme to defraud, or in any other criminal way. It was apparently used to express Lawrence's sentiments concerning what he perceived as the unacceptable job performance of coworkers; in their complaint, respondents claim only that they were subjected to the derogatory epithet "'motherfuckers'" and were told they were not "doing their jobs well." Those sentiments, whether rude, improper, inaccurate, or perceptive, cannot be the subject of prior restraints. (See *Dailey, supra*, 112 Cal. at p. 97; *Cohen v. California* (1971) 403 U.S. 15, 22-23 (*Cohen*) [The First Amendment protects the right to express the offensive sentiment, "'Fuck the Draft.'"].)

employees, Lawrence, does not follow the vague terms of the facially overbroad injunction. The injunction, thus, seeks to make one party vicariously liable for suppressing the free speech rights of another party. This is also an unprecedented departure from First Amendment standards, and this factor alone would require a vacating of the injunction. No appellate court has ever held under the First Amendment that an organization could be found in contempt simply because it was unable to suppress the speech or control the activities of one of its employees or members which were not authorized or ratified.[26] The U.S. Supreme Court has repeatedly rejected similar schemes for speech suppression through vicarious liability as unconstitutional. (See *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 930-932 [An organization could not be liable for the fiery rhetoric on racial matters of its employee and president, since imposition of such vicarious liability would violate the First Amendment.]; *Carroll v. Princess Anne* (1968) 393 U.S. 175, 183, [An injunction banning future rallies by an organization whose members had made racist speeches was unconstitutional: "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order."].)

Certainly one can wholeheartedly agree with the majority's view that offensive comments or rude epithets are socially undesirable and can evoke adverse emotions, without agreeing that the First Amendment allows the prior restraint of such comments when they are used by workers during on-the-job conversations: "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." (*R. A. V., supra*, 505 U.S. at p. 392.) Further, offensiveness in language can be a subjectively perceived condition (see *Cohen, supra*, 403 U.S. at pp. 22-23); and mere offensiveness, however lamentable, and even offensiveness based upon a legally protected classification, is not necessarily unlawful harassment (see *DeAngelis, supra*, 51 F.3d at pp. 595-596 [The "'mere utterance of an . . . epithet

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[26] In *Hacienda Hotel, supra*, 881 F.2d at pages 1518-1519, wrongly relied upon by the majority, there was no First Amendment issue raised, and no contempt remedy was imposed against an employer merely because an employee violated an injunction.

which engenders offensive feelings in an employee'" does not violate the antidiscrimination laws by creating a hostile work environment.]).

The problem with the trial court's injunction and the majority's dicta is that, to the extent they try ineffectively to ban certain words, they are not only futile and censorious, they are culturally parochial. They would impose an aesthetic standard of decorum on automobile service workers. Further, when given mechanical application by management, these directives would export middle-class manners, appropriate to a court or an office, into the vigorously physical, more frank and less euphemistic workaday world. (See, e.g., *Letter Carriers v. Austin* (1974) 418 U.S. 264, 283 [In the context of a labor dispute, unions have license to use intemperate, abusive, or insulting language without restraint or penalty in the belief that such rhetoric effectively makes its point.]; cf. *Collin, supra*, 447 F. Supp. at p. 699 [No prior restraints on racially derogatory speech are constitutionally permissible.].) We are not granted the right to suppress free speech by issuing prior restraint orders against impolite expressions of which we do not approve.(*R. A. V., supra*, 505 U.S. at p. 391.)[27]

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[27] As Professor Suzanna Sherry has observed, "Many of the new progressive strategies--especially the suppression of free speech and the insistence that a radical vision is superior to that which the populace has developed over the years--are based on a profoundly antidemocratic mistrust of the people's choices." (Sherry, *Progressive Regression* (1995) 47 Stan.L.Rev. 1097, 1114-1115.) Professor Sherry describes these new attacks on free speech as "authoritarian elitism." (*Id.* at p. 1115.) Be that as it may, while we need to accord a proper value to all diversity, this must also include diversity of viewpoint. We are unlikely to accord a proper value to diversity if we give preemptive value solely to racial diversity, and neglect the value of the diversity of viewpoints which the freedom of speech has historically allowed. (See Rorty, Contingency, irony, and solidarity (1989) pp. 51-52 ["It is central to the idea of a liberal [*sic*] society that, in respect to words as opposed to deeds, persuasion as opposed to force, anything goes."]; see also *Loving v. Virginia* (1967) 388 U.S. 1, 13 (conc. opn. of Stewart, J.) ["'[I]t is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.'" (Quoting *McLaughlin v. Florida* (1964) 379 U.S. 184, 198 (conc. opn. of Stewart, J.).)].) "Moreover, to impose *speech* limitations based on a culturally contested theory seems especially wrong." (Massaro, *Hate Speech, supra*, 32 Wm. & Mary L.Rev. at p. 243, italics in original.)

B. *These Unconstitutional Prior Restraints on Free Speech Are Also Vaguely and Overbroadly Worded*

The trial court's injunction and the majority's dicta seemingly require that an automobile service worker who addresses his coworkers on the job do so at his peril, unless he addresses them in some vaguely defined, politically correct manner. The majority suggests erroneously that other means of address, however innocuous or well intended, be proscribed, subjecting the speaker to contempt punishment and jail sentence if he does not strictly comply with such means of address. The majority, however, does not adequately define the vague and overbroad terms it uses in redefining the injunction, e.g., the term "workplace" which the majority proposes as a way to define its scope. (P. 16.) Does this mean *any* "workplace" or only one particular "workplace" which neither the majority nor the trial court specify? What are the boundaries of a "workplace" which the majority does not define? Can Lawrence carry a picket sign on the street in front of his place of employment, stating his views regarding his coworkers? The majority's dicta would perpetuate most of the same mistakes of overbreadth and unconstitutionality of the trial court, and disregard the principle that free speech guarantees protect everyone, even employers and supervisors who wish to express themselves to other workers on the job. However,"It is clear that 'an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed . . . .'" (*Holo-Krome Co. v. N.L.R.B.* (2d Cir. 1990) 907 F.2d 1343, 1345, quoting *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 617.) I repeat, the majority's belief that prior restraints are constitutional if confined to the "workplace" is simply wrong.[28]

Moreover, entry of an injunction against nonfighting words speech would not prevent racially offensive statements on the job not specifically addressed to respondents. Lawrence remains free under the majority's dicta and the trial court's injunction to proclaim odious statements such as "Mexicans go home" so long as he does not

[28] I particularly question the majority's suggestion that its prior restraints on free speech "'*are really not prior restraints at all.*'" (P. 14, italics added by the majority.) This simply is a further effort to bolster its repeated and erroneous premise that nonfighting words in a workplace constitute conduct, not speech regulated because of content, and are thus outside First Amendment protection.

specifically refer to respondents. The majority's dicta are therefore futile as well as unconstitutional.

The remainder of the trial court's injunction, to which the majority devotes scant attention (p. 22, fn. 14), is also troubling and demonstrates little consideration of the predicate conditions for injunctive relief. It vaguely bans "any uninvited intentional touching" (whatever that means) of "Hispanic/Latino employees, as long as [Lawrence] is employed by Avis Rent A Car System, Inc. in California." First, there was no basis for any finding of an ongoing need for injunctive relief, because the court found Lawrence had "popped" an employee on the back in previous years, without a finding he thereby intended to harm anyone. Second, if there really were a problem here, the availability of damages would create an adequate remedy, and injunctive relief is therefore inappropriate. Third, the injunctive language is overbroad and vague, and cannot mean what it purports to say. If for instance Lawrence were physically attacked by a coworker, his right of self-defense could not be measured by the racial background of the attacker. (See Civ. Code, § 50.) The majority also does not explain whether such injunctive language bans handshakes, a Heimlich maneuver for a choking employee, the handing over of a pay check, the delivery of a medal for distinguished service, or other intentional uninvited "touching" which would normally be accorded to non-Hispanic employees. However "touching" is defined, the injunction unfortunately does not ban only discriminatory "touching" on the job which might arguably violate the FEHA; similarly, the injunction also bans "investigations" of Hispanic/Latino employees without defining the term "investigations," and without limiting the injunction to conduct which violates the FEHA. The injunction therefore appears to *violate*, not vindicate, the principles of the FEHA, by according differential treatment to employees based upon their racial background in a manner which is not necessary to remedy any prior discrimination.(See *Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. ___ [132 L. Ed. 2d 158, 187, 115 S. Ct. 2097, 2117] ["[S]trict scrutiny" is to be applied to all race-based governmental action enacted as a remedy to the effects of past discrimination; such scrutiny requires any relief to be "narrowly tailored" to serve "compelling governmental interests."].) Neither the trial court nor this court should be in the position of thus ordering a party to violate a law.

The terms of the injunction and the majority's failure to respond to reasonable questions as to its import do not aid us or the parties in determining what the majority means by its dicta. That failure simply mirrors the vagueness and overbreadth of both the reversed injunction and the majority's dicta, and highlights their joint violation of the First Amendment to the federal Constitution as well as article I, section 2 of the California Constitution.

C. *The Proper Appellate Remedy Is to Honor the Terms of the Federal and State Constitutions, and Vacate the Void and Unconstitutional Injunction*

The proper resolution of the imposition of unconstitutional prior restraints in this case is the one specified by the California Supreme Court for workplace restrictions on free speech in the case of *In re Berry* (1968) 68 Cal. 2d 137, 156-157: "*The combination of what we have termed the 'overbroad' and the 'vague' aspects of the [injunctive] order in question render it a model of overreaching and confusion*. We therefore consider that the doctrine of severance cannot reasonably be applied. 'Where a provision encompasses both valid and invalid restrictions on free speech and its language is such that a court cannot reasonably undertake to eliminate its invalid operation by severance or construction, the provision is void in its entirety regardless of whether the particular conduct before the court could be constitutionally regulated and whether there is a severability clause applicable to the provision.' [Citations.] [¶] We hold that the order which petitioners are charged with disobeying is unconstitutionally overbroad in that it unnecessarily restricts the exercise of First Amendment rights; that the order is too vague and uncertain to satisfy requirements of notice and fair trial which are inherent in the due process clause of the Fourteenth Amendment; that the doctrine of severability is inapplicable; and that *the order is therefore void in its entirety*." (Italics added.)

These words are particularly applicable here. The majority's dicta endorsing creation of a new version of the injunction does not simply sever some severable portion of the trial court's injunction. The majority instead suggests a rewriting of a portion of the injunction with no factual record which would permit it to do so; without proper

consideration of the implications of its vague language;[29] and therefore, without me.[30] Further, I cannot find, as the majority implicitly does, that we should rely on the positing by one author, the late Hannah Arendt, that the sole source of contemporary totalitarianism (a subject of ancient and continued scholarly debate) is racial bias, to conclude that at the close of this century overzealous political correctness should trump and restrict constitutional rights of free speech developed over two centuries in our country. (Maj. opn., *ante*, at p. 25.) The clear and contrary holdings of our Supreme Court and that of the United States are legion.

The majority finally suggests that the First Amendment does not "make sense to anyone[]" when it bans prior restraint on speech that evokes no immediate breach of the peace, because the majority speculates repeated racial insults would thus be unabated and go unpunished. (P. 25.) The same argument can be made as to any offensive, insulting speech or slander for which the speaker and his

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[29] While the majority's proposed modification to the injunction does, at least, limit the trial court's injunction so that it will no longer apply to a verbal interchange at a private home (maj. opn., *ante*, at pp. 949-950), this limitation on the scope of the injunction is itself inconsistent with the majority's overall standard of review, and its insistence that free speech may be banned whenever its "secondary effects" would evoke adverse reaction in a place of employment. The injunction also cannot be justified as a response to a violation of the FEHA, because the injunction bans much speech which does not violate the FEHA. It is not narrowly tailored to reach only derogatory fighting words in an employment setting which violate the FEHA.

[30] The majority correctly reverses the injunction, but wrongly remands for entry of a new, less overbroad injunction specifying the exact "racial or ethnic epithets" used by Lawrence which are being enjoined. (Pp. 19-20.) This is futile. The only epithet shown by the record is "'motherfuckers,'" which is not a racial or ethnic epithet and is not a fighting word subject to suppression by prior restraint. The only authority cited is the district court's opinion in *Snell, supra*, which banned fighting words in a prison setting while noting that the court was not addressing the First Amendment implications of such a ruling, because (unlike here) the parties did not raise the issue. (611 F. Supp. at p. 531.) Further, while the words specified by the *Snell* court may have been, on the evidence adduced in that case, "fighting words" in the context of a prison, those words were not spoken here. The trial court here could not find the words spoken by Lawrence to be fighting words, since they did not provoke or lead to any immediate violence. Further, a proscription and prior restraint against certain words constitutes overbroad censorship, since it would ban the utterance of those words in any possible context, however innocuous; e.g., if Lawrence says, "Some call them spics, but I think they are people just like us," then Lawrence risks unconstitutional punishment for his exercise of free speech.

employer, if the doctrine of respondeat superior applies, are subject to after-the-fact damages. The "sense" made of the decades long precedent of the federal and our Supreme Courts' proscribing prior restraints of speech under the majority's hypothetical "is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." (*Southeastern Promotions, supra*, 420 U.S. at p. 559, italics in original.) This case demonstrates the accuracy of those words.

The primary purpose and function of all speech is the production of some secondary effect. I share the concern of my colleagues in eliminating racist remarks and attitudes in society, an ancient concern not isolated to the 20th century. However, the majority's expansion of nonfighting words speech into conduct as a rationale for an injunction proscribing such speech, if upheld, is not just a minor encroachment on the constitutional right of free speech. It is unprecedented, and the mischief it will generate in encouraging wholesale efforts to restrict free speech deemed politically incorrect is predictably wide.

By abandoning or ignoring the teachings of the federal Supreme Court and our high court defining the traditional restrictions in a few limited areas on the exercise of free speech, the majority paves the way to encourage solicitation and receipt of injunctive orders of prior restraint proscribing *all* speech that is contended to "poison[] the atmosphere" (p. 16) of schools, universities, places of employment, and a myriad of other places and organizations in this state, i.e., by thereby producing "secondary effects" allegedly constituting racism, sexism, ageism, homophobism, harassment, or the production of emotional distress. While I understand how a well intentioned desire to deal with such social issues may erroneously lead, as in the majority opinion, to schemes for the suppression of free speech, those concerns have historically never been, and may not now be, resolved by reducing First Amendment protection or the free speech guarantee of the California Constitution to a subordinate position in our society.

This case illustrates that such injunctive orders do and will give new life to overboard and unprecedented censorship of speech, long abhorred and rejected in the jurisprudence and tradition of this

country and state. (*Dailey, supra*, 112 Cal. at p. 97.) The politically correct camel now will have its nose under the First Amendment tent that has long sheltered our citizens from such censorship.

Finally, to paraphrase *R. A. V., supra*, 505 U.S. at page 396: "Let there be no mistake about our belief that [the use of racial epithets or racially derogatory speech in the workplace] is reprehensible. But [our society] has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." Neither should we put the torch to article I, section 2 of our own Constitution, which guarantees all Californians the right to "freely speak" our "sentiments on all subjects." I would find the trial court's unconstitutional restraint on free speech to be entirely void and not subject to remand.

PETERSON, P.J.

APPENDIX C

EDWIN L. CURREY, JR. (State Bar No. 36329)
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Attorneys for Plaintiffs

ENDORSED
FILED
San Francisco County Superior Court
FEB 14, 1995
ALAN CARLSON, Clerk
BY: RANI EDWARDS,
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

OSCAR AGUILAR; CARLOS BENAVIDES; FRANCISCO DIAZ; HERNAN FIGUEROA; MIGUEL FONSECA; RAMIRO HERNANDEZ; PABLO ICABALCETA; HUBERT JIMENEZ; GERMAN LAZO; PEDRO MOJICA; ORLANDO PERAZA; OSWALDO RAMIREZ; MARCOS RECINOS; CARLOS REYES; FRANCISCO ROSALES; TOMAS RUBIO; and MARIO SERRANO,

Plaintiffs,

v.

AVIS, INC; KATHY BLACK; MARY GALLAGHER; SUSAN HAGEN; KATHY KLOPFER; JOHN LAWRENCE; KATIE MATSU; OWEN de SAUZA; DAVID SHARP; TONY VILLAMIL; GRETCHEN KUCH; and DOES 1-20,

Defendants.

No. 948597

PERMANENT INJUNCTION

COURT: CARLOS T. BEA
DEPT: 16

Prevailing plaintiffs ~~Miguel Fonseca~~, Ramiro Hernandez, German Lazo, Pedro Mojica, Orlando Peraza, Oswaldo Ramirez, Marcos Recinos, Carlos Reyes and Mario Serrano petitioned the Court for equitable relief in the form of prohibitory and mandatory injunctions against defendants John Lawrence and Avis Rent A Car System, Inc. After briefing was submitted by the parties, the Court heard oral argument on December 15, 1994. Edwin L. Currey and Renée Saucedo appeared on behalf of plaintiffs and JoAnne Dellaverson, Joel Kelly and Donna Rutter appeared on behalf of defendants.

Having considered the evidence adduced at trial, the entire record before the Court, and the briefing and argument on plaintiffs' petition, and GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED that a permanent prohibitory and mandatory injunction be, and hereby is, entered against defendants John Lawrence and Avis Rent A Car System, Inc. as follows:

1. Defendant John Lawrence shall cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc., and shall further refrain from any uninvited intentional touching of said Hispanic/Latino employees, as long as he is employed by Avis Rent A Car System, Inc. in California.

2. Defendant Avis Rent A Car System, Inc. shall cease and desist from allowing defendant John Lawrence to commit any of the acts described in paragraph 1 above, under circumstances in which it knew or should have known of such acts; and shall further not investigate or permit investigations regarding breaches of its employment rules or practices when such investigations are limited to subjects or targets who are Hispanic/Latino employees of said defendant, unless the circumstances are such that no employees other than Hispanic/Latino are reasonably subjects or targets of such investigation(s).

3. Defendant Avis Rent A Car System, Inc. shall post in consipicuous places at employee check-in location(s) at its San Francisco Airport location(s) the following three posters in the English and Spanish languages:

a. A variation of Avis' existing "Business Abuse" poster (Trial Exhibit "G") in the form attached hereto as Exhibit "1", which shall be modified to include the following languages: "If you ever become aware of any illegal, unethical, discriminatory, harassing or irresponsible activity which harms Avis, its employees or customers . . . SPEAK UP! DISCUSS IT WITH: ▪ Your Supervisor ▪ Any Local Manager ▪ Avis World headquarters at 516-222-3397. Or, if you prefer to remain anonymous, call The Network at 1-800-241-5689" (See Spanish language changes, attached as Exhibit "1A" hereto;

b. The United States Equal Employment Opportunity Commission poster (Trial Exhibit 11 – Spanish version; Trial Exhibit II – English version); and

c. The California Department of Fair Employment and Housing poster (Trial Exhibit 12 – English and Spanish versions).

4. Defendant Avis Rent A Car System, Inc. shall publish a policy statement in Engligh and Spanish delineating employee rights and manager responsibilities with regard to employee complaints of racial or national origin harassment or discrimination in the forms attached hereto as Exhibit "2," in English, and Exhibit "2A," in Spanish, and incorporated herein as though set forth in full. Defendant Avis Rent A Car System, Inc. shall post the policy statement in English and Spanish in conspicuous places at employee check-in location(s) at its San Francisco Airport location(s) along with the posters mandated under paragraph 15 above. Defendant Avis Rent A Car System, Inc. shall be permanently enjoined to follow the form of this policy, although telephone numbers and persons to whom to report may change as circumstances alter.

The Court DENIED without prejudice of renewal plaintiffs' request for mandatory injunctions (1) requiring additional training of Avis management on racial and national origin discrimation and harassment, and (2) requiring adoption of a formal racial harassment policy based on Avis' sexual harassment policy. .

IT IS SO ORDERED.

Dated: FEB 14, 1995

/s/ CARLOS BEA
CARLOS T. BEA
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM:
McKENNA & CUNEO

/s/ JoAnne Dellaverson
By: JOANNE DELLAVERSON
Attorneys for Defendants

Please Don't Ignore
Business Abuse.

Por Favor No Ignore el Abuso en el Trabajo

[Picture, See Next Page, C 6]

Ignoring a problem won't make it go away. It only allows it to become larger and more costly. If you ever become aware of an illegal, unethical, discriminatory or irresponsible activity which harms Avis, its employees or customers ... SPEAK UP! DISCUSS IT WITH:

- Your Supervisor
- Any Local Manager
- Avis World Headquarters at 516-222-3397

Or, if you prefer to remain anonymous, call The Network.

Ignorar el problema no hace que el mismo des aparezca, la ... hace es que crece si hace mas costoso. Si usted se entera de actividades ilegales no eticas; de discriminacion o de actividades irresponsables que le hace dano a Avis sus empleados o clientes: NO SE QUEDE CALLADO DISCUTALO CON:

- Su Supervisor
- Cualquier Gerente Local
- Las Oficina Principal de Avis al 516-222-3397

O si prefieres hacerlo en anonimo, llame a The Network.

AVIS

The Network
call toll free
1-800-241-5689

EXHIBIT 1

Spanish language to be used in poster attached hereto as Exhibit 1

(Initial caps at top of page)

Por favor No Ignorar el Abuso Laboral.

(text at bottom of page)

El ignorar un probema no resultará en que desaparezca. Lo único que hace es formentar que crezca y que se haga mas costoso.

Si se entera de actividades ilegales, inéticas, discrimanatorias, hostigatorios o irresponsables, que puedan dañar los intereres de Avis, sus empleados y sus clients ... NO SE QUEDE CALLADO! TRATELO CON SU JEFE - CUALQUIER GERENTE LOCAL - LAS OFICINAS PRINCIPALES DE AVIS en el (516) 222-3397.

O si prefiere hacerlo en anónimo, llame a The Network at 1-800-241-5689.

EXHIBIT 1A

MEMORANDUM

TO: All SFO Employees and Managers

RE: Avis Race/National Origin Discrimination Policy; Procedures for Complaints

It is the policy of Avis that there shall be no discrimination or harassment with respect to employment, or any of the terms or conditions of employment, because of race or national origin.

If you believe you have been discrminated against or harassed by any Avis employee or manager, you should immediately report the incident to any one of the following: either the Airport manager, the District Manager, the Regional Human Resources Director at (415) 259-1158, the Equal Employment Opportunity ("EEO") Department in New York at (516) 222-3497, or "The Network" at 1-800-241-5689 where you may report anonymously. Avis will not retaliate, nor will it tolerate retaliation, against employees who complain about discrimination or harassment based on race or national origin in the work place.

Avis will promptly investigate any such report and will take whatever corrective action is deemed necessary, including disciplining or discharging any individual who is believed to have violated those prohibitions against discrimation, harassment or retaliation. Any manager who receives a complaint of discrimination or harassment based on race or national origin should immediately report the complaint to the Equal Employment Opportunity ("EEO") Department in New York. The EEO Department will coordinate the investigation and remedy any such complaint.

Exhibit 2

MEMORANDUM

Atencion: Todos los empleados y gerentes de SFO

Ref.: Disposición de Avis sobre discriminación por razón de raza u orígen nacional; procedimientos de reclamación.

Es la disposicion de Avis que no habrá ningún acoso o discrminanción con respecto al empleo, o a alguno de los términos o condiciones de empleo, por razón nacional.

Si usted cree que ha sido discrimando o acosado de manera alguna por cualquier empleado o gerente de Avis, Ud. debe dar parte del incidente inmediatemente a alguno de los siguientes: al Gerente del Aeropurto, el Gerente de Distrito, el Director Regional de Recursos Humanos al (415) 259-1158, el Departamento de Igualdad de Oportunidades de Empleo [EEO] en Nueva York al (516) 222-3497, o a la Red [The Network] al 1-800-241-5689, donde Ud. puede dar parte anónimamente. Avis no efectuará represalias, ni tolerará las represalias, contra los empleados que se queje sobre discriminación o acoso por razón de raza u orígen nacional en el sitio laboral.

Avis investigará puntualmente cualquier informe de este índole y efectuará cualquier acción correctiva que se vea necesaria, incluyendo la disciplina o el despido de cualquier individuo de quien se crea que haya quebrantado esas prohibiciones contra la discrminación, el acoso, o las represalias. Cualquier gerente que reciba una queja de discriminación o acoso por razón de raza u orígen nacional debería remitir la queja inmediatamente al Departamento de Igualdad de Empleo [EEO] en Nueva York. El Departamento EEO inmediatamente pondrá en marcha la investigación y el remedio de cualquier queja de este tipo.

EXHIBIT 2A

APPENDIX D

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ENDORSED
FILED
San Francisco County Superior Court
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ALAN CARLSON, Clerk
By: /s/ EDWARDS, Deputy Clerk

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PEDRO MOJICA, ORLANDO PERAZA,
OSWALD RAMIREZ, MARCOS RECINOS,
CARLOS REYES, and MARIO SERRANO

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

OSCAR AGUILAR; CARLOS BENAVIDES;
FRANCISCO DIAZ; HERNAN FIGUEROA;
MIGUEL FONSECA; RAMIRO HARNANDEZ;
PABLO ICABALECETA; HUBERT JIMENEZ;
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ORLANDO PERAZA; OSWALDO RAMIREZ;
MARCOS RECINOS; CARLOS REYES;
FRANCISCO ROSALES; TOMAS RUBIO;
and MARIO SERRANO,
Plaintiffs,

v.

AVIS, INC.; KATHY BLACK; MARY GALLAGHER; SUSAN HAGEN; KATHY KLOPFER; JOHN LAWRENCE; KATIE MATSU; OWEN de SAUZA; DAVID SHARP; TONY VILLAMIL; GRETCHEN KUCH; and DOES 1-20,
Defendants.

NO. 948597

AMENDED JUDGMENT

COURT: CARLOS T. BEA

DEPT. 16

This action came on regularly for trial on August 10, 1994 in Department No. 16 of the above-entitled Court, the Honorable Carlos Bea presiding; the plaintiffs appearing by attorneys Edwin L. Currey, Jr., Janine S. Simerly, Albert P. Bedecarre of Bronson & McKinnon, and Renee Saucedo of La Raza Centro Legal, and the defendants appearing by attorneys Joanne Dellaverson, Joel Kelly and Donna Rutter of McKenna & Cuneo.

JURY VERDICTS

A jury of 16 persons was impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, 12 of the 16 jurors were duly instructed by the Court, and the cause was submitted to the jury with directions to return verdicts on special issues. The jury deliberated and thereafter returned into court with its verdicts consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdicts were in words and figures as follows, to wit:

a. Plaintiffs Ramiro Hernandez, German Lazo, Pedro Mojica, Orlando Peraza, Oswaldo Ramirez, Marcos Recinos, Carlos Reyes and Mario Serrano were each harassed or discriminated against because of their race, national origin or ancestry by a supervisor of defendant Avis Rent A Car System, Inc.

b. Plaintiffs Pedro Mojica, Orlando Peraza and Marcos Recinos were harassed or discriminated against because of their race, national origin or ancestry by defendant John Lawrence.

c. Defendant Avis Rent A Car System, Inc. either knew or should have known about the harassing or discriminatory treatment of plaintiffs Pedro Mojica and Orlando Peraza by defendant John Lawrence, and failed to take immediate and appropriate corrective action.

d. Plaintiffs Ramiro Hernandez, German Lazo, Pedro Mojica, Orlando Peraza, Oswaldo Ramirez, Marcos Recinos, Carlos Reyes and Mario Serrano each suffered severe emotional distress as a result of such harassment or discrimination.

e. Plaintiff Ramiro Hernandez is awarded $15,000.00 for emotional distress caused by such harassment or discrimination.

f. Plaintiff German Lazo is awarded $15, 000.00 for emotional distress caused by such harassment or discrimination.

g. Plaintiff Pedro Mojica is awarded $25,000.00 for emotional distress caused by such harassment or discrimination.

h. Plaintiff Orlando Peraza is awarded $25,000.00 for emotional distress caused by such harassment or discrimination.

i. Plaintiff Oswaldo Ramirez is awarde $15,000.00 for emotional distress caused by such harassment or discrimination.

j. Plaintiff Marcos Recinos is awarded $25,000.00 for emotional distress caused by such harassment or discrimination.

k. Plaintiff Carlos Reyes is awarded $15,000.00 for emotional distress caused by such harassment or discrimination.

l. Plaintiff Mario Serrano is awarded $15,000.00 for emotional distress caused by such harassment or discrimination.

m. Plaintiffs Oscar Aguilar, Hernan Figueroa and Pablo Icabalceta were not harassed or discriminated against because of their race, national origin or ancestry by a supervisor of defendant Avis Rent A Car System, Inc.

n. Plaintiffs Oscar Aguilar and Pablo Icabalceta were not harassed or discriminated against because of their race, national origin or ancestry by defendant John Lawrence.

o. Plaintiff Miguel Fonseca was harassed or discriminated against because of his race, national origin or ancestry by defendant John Lawrence.

p. Defendant Avis Rent A Car System, Inc. either knew or should have known about the harassing or discriminatory treatment

of plaintiff Miguel Fonseca by defendant John Lawrence, and failed to take immediate and appropriate corrective action.

q. Plaintiff Miguel Fonseca did not suffer severe emotional distress as a result of such harassment or discrimination.

r. Plaintiff Oscar Aguilar was not terminated because he complained orally to Avis of harassment or discrimination based on his race, national origin or ancestry.

s. Plaintiff Hernan Figueroa was not terminated because of his race, national origin or ancestry.

t. Defendants Mary Gallagher and Kathy Klopfer were not guilty of oppression or malice in their conduct toward plaintiff Ramiro Hernandez, or any other plaintiff.

u. Defendant John Lawrence was not guilty of oppression or malice in his conduct toward plaintiffs Ramiro Hernandez, Pedro Mojica, Orlando Peraza or Marcos Recinos, or any other plaintiff.

v. Defendant Avis Rent A Car System, Inc. was not guilty of oppression or malice toward any plaintiff.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff Ramiro Hernandez is entitled to judgment in his favor against defendant Avis Rent A Car Systems, Inc. in the amount of $15,000.00.

2. Plaintiff German Lazo is entitled to judgment in his favor against defendant Avis Rent A Car Systems, Inc. in the amount of $15,000.00.

3. Plaintiff Oswaldo Ramirez is entitled to judgment in his favor against defendant Avis Rent A Car Systems, Inc. in the amount of $15,000.00.

4. Plaintiff Carlos Reyes is entitled to judgment in his favor against defendant Avis Rent A Car Systems, Inc. in the amount of $15,000.00

5. Plaintiff Mario Serrano is entitled to judgment in his favor against defendant Avis Rent A Car Systems, Inc. in the amount of $15,000.00.

6. Plaintiff Pedro Mojica is entitled to judgment in his favor against defendants Avis Rent A Car Systems, Inc. and John Lawrence, jointly and severally, in the amount of $25,000.00.

7. Plaintiff Orlando Peraza is entitled to judgment in his favor against defendants Avis Rent A Car Systems, Inc. and John Lawrence, jointly and severally, in the amount of $25,000.00.

8. Plaintiff Marcos Recinos is entitled to judgment in his favor against defendants Avis Rent A Car Systems, Inc. and John Lawrence, jointly and severally, in the amount of $25,000.00.

9. Defendant Avis Rent A Car System, Inc. is entitled to judgment in its favor against plaintiffs Oscar Aguilar, Miguel Fonseca, Hernan Figueroa and Pablo Icabalceta.

10. Defendant Kathy Klopfer is entitled to judgment in her favor against all plaintiffs, namely Oscar Aguilar, Hernan Figueroa, Miguel Fonseca, Ramiro Hernandez, Pablo Icabalceta, German Lazo, Pedro Mojica, Orlando Peraza, Oswaldo Ramirez, Marcos Recinos, Carlos Reyes and Mario Serrano.

11. Defendant Mary Gallagher is entitled to judgment in her favor against plaintiffs Ramiro Hernandez and Carlos Reyes.

12. Defendant John Lawrence is entitled to judgment in his favor against plaintiffs Oscar Aguilar, Miguel Fonseca, Ramiro Hernandez, Pablo Icabalceta, German Lazo, Oswaldo Ramirez, Carlos Reyes and Mario Serrano.

COURT'S FINDINGS AND CONCLUSIONS

ON EQUITABLE ISSUES

Prevailing plaintiffs Ramiro Hernandez, German Lazo, Pedro Mojica, Orlando Peraza, Oswaldo Ramirez, Marcos Recinos, Carlos Reyes and Mario Serrano petitioned the Court for equitable relief in the form of prohibitory and mandatory injuctions based upon the facts adduced at trial and the entire record before the Court. After briefing was submitted by the parties, the Court heard oral argument on December 15, 1994. The Court granted plaintiffs' petition on December 15, 1994 and ordered the entry of prohibitory injunctions against defendants John Lawrence and Avis Rent A Car System, Inc. and mandatory injunctions against Avis Rent A Car System, Inc.

NOW, THEREFORE, IT IS FURTHER ORDERED, ADJUDGED AND DECREED, based upon the evidence adduced at trial, the entire record before the Court, and the briefing and argument on plaintiffs' petition, that a permanent prohibitory and mandatory injunction shall be entered as follows:

13. Defendant John Lawrence shall cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc., and shall further refrain from any uninvited intentional touching of said Hispanic/Latino employees, as long as he is employed by Avis Rent A Car System, Inc. in California.

14. Defendant Avis Rent A Car System, Inc. shall cease and desist from allowing defendant John Lawrence to commit any of the acts described in paragraph 13 above, under circumstances in which it knew or should have known of such acts; and shall further not investigate or permit investigations regarding breaches of its employment rules or practices when such investigations are limited to subjects or targets who are Hispanic/Latino employees of said defendant, unless the circumstances are such that no employees other than Hispanic/Latinos are reasonably subjects or targets of such investigation(s).

15. Defendant Avis Rent A Car System, Inc. shall post in conspicuous places at employee check-in location(s) at its San Francisco Airport location(s) the following three posters in the English and Spanish languages:

a. A variation of Avis' existing "Business Abuse" poster (Trial Exhibit "G") in the form attached hereto as Exhibit "1", which shall be modified to include the following language: "If you ever become aware of any illegal, unethical, discriminatory, harassing or irresponsible activity which harms Avis, its employees or customers ... SPEAK UP! DISCUSS IT WITH: ▪ Your Supervisor ▪ Any Local Manager ▪ Avis World Headquarters at 516-222-3397. Or, if you prefer to remain anonymous, call The Network at 1-800-241-5689" (See Spanish language changes, attached as Exhibit "1A" hereto;

b. The United States Equal Employment Opportunity Commission poster (Trial Exhibit 11 – Spanish version; Trial Exhibit II – English version); and

c. The California Department of Fair Employment and Housing poster (Trial Exhibit 12 – English and Spanish versions).

16. Defendant Avis Rent A Car System, Inc. shall publish a policy statement in English and Spanish delineating employee rights and manager responsibilities with regard to employee complaints of racial or national origin harassment or discrimination in the forms attached hereto as Exhibit "2," in English, and Exhibit "2A," in

Spanish , and incorporated herein as though set forth in full. Defendant Avis Rent A Car System, Inc. shall post the policy statement in English and Spanish in conspicuous places at employee check-in location(s) at its San Francisco Airport location(s) along with the posters mandated under paragraph 15 above. Defendant Avis Rent A Car System, Inc. shall be permanently enjoined to follow the form of this policy, although telephone numbers and persons to whom to report may change as circumstances alter.

17. In addition to posting, defendant Avis Rent A Car System, Inc. shall distribute copies of the policy statement attached hereto as Exhibit "2" to all existing employees and managers at the San Francisco Airport, as well as all newly hired or transferred employees and managers at the San Francisco Airport. All managers shall be required to acknowledge receipt of the policy statement in writing, and records shall be maintained to show compliance with this provision of the injunction.

Recovery, if any, of statutory attorneys fees and costs will be determined by the Court after further submissions by the parties.

Dated: February 27, 1995

/s/ CARLOS BEA
CARLOS T. BEA
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM:
McKENNA & CUNEO

/s/ Donna Rutter
Donna Rutter
Attorneys for Defendants

Date: February 24, 1995

Please Don't Ignore
Business Abuse.

Por Favor No Ignore el Abuso en el Trabajo

[Picture, See Next Page, D 9]

Ignoring a problem won't make it go away. It only allows it to become larger and more costly. If you ever become aware of an illegal, unethical, discriminatory or irresponsible activity which harms Avis, its employees or customers ... SPEAK UP! DISCUSS IT WITH:

- Your Supervisor
- Any Local Manager
- Avis World Headquarters at 516-222-3397

Or, if you prefer to remain anonymous, call The Network.

Ignorar el problema no hace que el mismo des aparezca, la ... hace es que crece si hace mas costoso. Si usted se entera de actividades ilegales no eticas; de discriminacion o de actividades irresponsables que le hace dano a Avis sus empleados o clientes: NO SE QUEDE CALLADO DISCUTALO CON:

- Su Supervisor
- Cualquier Gerente Local
- Las Oficina Principal de Avis al 516-222-3397

O si prefieres hacerlo en anonimo, llame a The Network.

AVIS

The Network
call toll free
1-800-241-5689

EXHIBIT 1

MEMORANDUM

TO: All SFO Employees and Managers
RE: Avis Race/National Origin Discrimination Policy; Procedures for Complaints

It is the policy of Avis that there shall be no discrimination or harassment with respect to employment, or any of the terms or conditions of employment, because of race or national origin.

If you believe you have been discriminated against or harassed by any Avis employee or manager, you should immediately report the incident to any one of the following: either the Airport Manager, the District Manager, the Regional Human Resources Director at (415) 259-1158, the Equal Employment Opportunity ("EEO") Department in New York at (516) 222-3497, or "The Network" at 1-800-241-5689 where you may report anonymously. Avis will not retaliate, nor will it tolerate retaliation, against employees who complain about discrimination or harassment based on race or national origin in the work place.

Avis will promptly investigate any such report and will take whatever corrective action is deemed necessary, including disciplining or discharging any individual who is believed to have violated those prohibitions against discrimination, harassment or retaliation. Any manager who receives a complaint of discrimination or harassment based on race or national origin should immediately report the complaint to the Equal Employment Opportunity ("EEO") Department in New York. The EEO Department will coordinate the investigation and remedy any such complaint.

Exhibit 2

MEMORANDUM

Atencion: todos los empleados y gerentes de SFO

Ref: Disposicion de Avis sobre discriminacion por razon de raza u origen nacional; procediminentos de reclamacion.

Es la disposicion de Avis que no habra ningun acoso o discriminacion con respecto al empleo o a alguno de los terminos o condiciones de empleo, por razon de raza u origen nacional.

Si usted cree que ha sido discriminado o acosado de manera alguna por cualquier empleado o gerente de Avis, Ud. debe dar parte del incidente inmediatamente a alguno de los siguientes: al Gerente del Aeropuerto, el Gerente del Distrito, el Director Regional de Recursos Humanos al (415) 259-1158, el Departamento de Igualdad de Opotunidades de Empleo [EEO] en Nueva York al (516) 222-3497, o a la Red [The Network] al 1-800-241-5689, donde Ud. puede dar parte anonimamente. Avis no efectuara represalias, ni tolerara las represalias, contra los empleados que se quejen sobre discriminacion o acoso por razon de raza u origen nacional en el sitio laboral.

Avis investigara puntualmente cualquier informe de este indole y efectuara cualquier accion correctiva que se vea necesaria, incluyendo las disciplina o el despido de cualquier individuo de quien se crea que haya quebrantado esas prohibiciones contra la discriminacion, el acosco, o las represalias. Cualquier gerente que reciba una queja de discriminacion o acosco por razon dr raza u origen nacional deberia remitir la queja inmediatamente al Departamento de Igualdad de Empleo [EEO] en Nueva York. El Departamento EEO inmediatamente pondra en marcha la investigacion y el remedio de cualquier queja de este tipo.

EXHIBIT 2A

PROOF OF SERVICE BY PERSONAL DELIVERY

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is .

On June 28, 1996, I served the APPENDIX OF PETITIONERS AVIS RENT A CAR SYSTEM, INC. AND JOHN LAWRENCE IN SUPPORT OF PETITION FOR REVIEW on the interested parties int his action by placing the **true copy**/original thereof by hand to the addressee hereinbelow described:

SEE ATTACHED SERVICE LIST.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(FEDERAL) I declare under penalty of perjury that the foregoing is true and correct, and that I have been employed by an office of a member of the bar of this Court at whose direction the service was made.

Executed on June 28, 1996

/s/ Marie Krank
Signature

Marie Krank
Print Name

SERVICE LIST

Clerk
California Supreme Court
303 Second Street, South Tower, 8th Floor
San Francisco, CA 94107-9400
(original and 13 copies)

Clerk
Courts of Appeal
First Appellate District
303 Second Street, South Tower
San Francisco, CA 94107
(one copy)

Carlos T. Bea, Judge
SAN FRANCISCO SUPERIOR COURT
Department 16
633 Folsom Street
San Francisco, CA 94107
(one copy)

Albert P. Bedecarre, Esq.
BRONSON, BRONSON & McKINNON
505 Montgomery Street
San Francisco, CA 94111

Renee Saucedo, Esq.
Seymour Bielder, Esq.
LA RAZA CENTRO LEGAL
474 Valencia Street, Suite 293
San Francisco, CA 94103

APPENDIX E

CASE NO. S054561
IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RECEIVED
MAR 26, 1997
CLERK SUPREME COURT

OSCAR AGUILAR, et al.,
Plaintiffs and Respondents,
vs.
AVIS RENT A CAR SYSTEM, INC., et al.,
Defendants and Appellants

1ST Civil No. A069353
(San Francisco Sup. Ct. No. 948597)

After A Decision By The Court Of Appeal
First Appellate District, Division Five
(Donald B. King, Associate Justice)

NOTICE OF MOTION AND MOTION OF APPELLANTS AVIS RENT A CAR SYSTEM, INC. AND JOHN LAWRENCE TO AUGMENT THE RECORD ON APPEAL

JoANNE DELLAVERSON, SBN 100567
JOEL P. KELLY, SBN 100716
TOM MYERS, SBN 176008
CURIALE DELLAVERSON
HIRSCHFELD KELLY & KRAEMER, LLP
225 Bush Street, 5th Floor
San Francisco, CA 94104
(415) 834-0444
Attorneys for Defendants and Appellants
AVIS RENT A CAR SYSTEM, INC. and
JOHN LAWRENCE

TO RESPONDENTS AND TO THEIR ATTORNEYS OF RECORD:

Please take notice that by this motion, Appellants Avis Rent A Car System, Inc. and John Lawrence hereby request the Court to augment the Record on Appeal with a jury instruction from the trial court proceeding below, establishing conclusively that Appellant Lawrence was and is not a supervisory employee of Appellant Avis. Jury Instruction No. 23 (attached as Exhibit A) submitted to the jury on October 17, 1994 states *inter alia* "John Lawrence is not a supervisor of Avis."

While the record as it currently exists clearly establishes that Lawrence is not a supervisory employee, augmentation of the record is necessary to remove any confusion as to Lawrence's status. Amici curiae for Respondents misstate Lawrence's job status, and rely heavily on this status in concluding that the ruling of the Court of Appeals should stand. Moreover, while Lawrence's job status was irrelevant to the decision of the Court of Appeals, and Appellants contend that it is irrelevant to the issues before this Court, the Court may find his status germane; clarity thus is required.

DATED: 3-26-97

CURIALE DELLAVERSON HIRSCH FELD KELLY & KRAEMER, LLP

By /s/ JoAnne Dellaverson
JoAnne Dellaverson
Attorneys for Defendants and Appellants
AVIS RENT A CAR SYSTEM, INC. and JOHN LAWRENCE

I.

ARGUMENT

John Lawrence, in his position as Service Agent with Avis Rent A Car System, Inc., is not a supervisory employee of Avis. This undisputed fact is apparent from the Special Verdicts completed by the jury in the underlying trial, (Appellants' Appendix In Lieu Of Court Transcript, pp. 031 - 065), and which are part of the record on appeal. Despite this, amici curiae for Respondents mistakenly state that Lawrence is a supervisor, and base much of their arguments on this error.

The source of this error is unclear. Each of these Verdict Forms asks identical questions:

1.a. Do you find that [Plaintiff] was either harassed or discriminated against because of his race, national origin or ancestry by a supervisor(s) of defendant Avis Rent A Car System, Inc. ("Avis")?

1.b. Do you find that plaintiff [ ] was either harassed or discriminated against because of his race, national origin or ancestry by John Lawrence?

1.c. Did Avis Rent A Car System, Inc. know or should it have known about John Lawrence's conduct described in 1.b and did Avis fail to take immediate and appropriate corrective action?

First, the Verdicts ask the jury to determine whether a plaintiff was harassed or discriminated against by a supervisor of Avis. In the very next question, jurors are asked to determine if a plaintiff was harassed or discriminated against by John Lawrence. By addressing the alleged conduct of Lawrence separately from that of supervisory employees of Avis, it is clear that Lawrence is not a supervisory employee of Avis.

Lawrence's non-supervisory status is confirmed in question 1.c., which asks whether Avis knew or should have known of Lawrence's alleged conduct. If Lawrence were a supervisory employee of Avis, this question would be irrelevant and superfluous, because an entity is *strictly liable* for the discrimination of its supervisors. Cal. Gov't Code Section 12940(h)(1); *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397 (1994). An entity is liable for the acts of its non-supervisory employees only if it knew or should have known of the conduct. Gov't Code Section 12940(h)(1). In the underlying case, Avis was properly held to a known or should have known standard

for Lawrence's alleged acts because Lawrence was not a supervisory employee of Avis.

Finally, the trial court expressly recognized that Lawrence is not a supervisory employee of Avis. It noted at the hearing on post-trial relief that respondeat superior liability of Avis existed as to some defendant employees, but not as to Lawrence. Appellants' Appendix In Lieu Of Court Transcript, p. 099.

All of this was explained to this Court in Appellants' Opening Brief, at p. 7 n. 1.

While Respondents have referred to Lawrence as a Service "manager," they have not argued on appeal that he is a supervisory employee, nor have they presented any evidence that he is a supervisory employee. Moreover, the decision of the Court of Appeals below did not turn on the employment status of Lawrence. In addition, Appellants maintain that Lawrence's employment status is irrelevant to the determination of the issues currently before this Court. Nevertheless, amicus curiae American Civil Liberties Union of Northern California (at page 1 of their brief) and the Employment Law Center (at page 3 of their brief) assert that Lawrence is a supervisory employee of Avis, and find great significance in this status.

For the sake of clarity, and should this Court resolve that Lawrence's employment status is germane to the issues before it, Appellants submit Jury Instruction No. 23 attached as Exhibit A. This instruction expressly provides *inter alia* "John Lawrence is not a supervisor of Avis." It was provided to the jury for their use in deliberating, and the trial court judge used this fact in issuing the injunction that is at issue here.

II.

CONCLUSION

For the above reasons, the Record on Appeal should be augmented to show that Appellant John Lawrence was not and is not a supervisory employee of Appellant Avis Rent A Car System, Inc.

DATED: 3-26-97

CURIALE DELLAVERSON HIRSCHFELD KELLY & KRAEMER, LLP

By /s/ JoAnne Dellaverson
JoAnne Dellaverson
Attorneys for Defendants and Appellants
AVIS RENT A CAR SYSTEM, INC. and
JOHN LAWRENCE

CASE NO. S054561
IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

OSCAR AGUILAR, et al.,
Plaintiffs and Respondents,
vs.
AVIS RENT A CAR SYSTEM, INC., et al.,
Defendants and Appellants.

1st Civil No. A069353
(San Francisco Sup. Ct. No. 948597)

DECLARATION OF JOANNE DELLAVERSON IN SUPPORT OF MOTION OF APPELLANTS AVIS RENT A CAR SYSTEM, INC., AND JOHN LAWRENCE TO AUGMENT THE RECORD ON APPEAL

1. I am a partner in the law firm of Curiale Dellaverson Hirschfeld Kelly & Kraemer, LLP. Prior to January 10, 1997, I was a partner with the law firm of McKenna & Cuneo, L.L.P., and in that capacity was lead trial counsel for appellants Avis Rent A Car System, Inc. and John Lawrence in the trial of this matter. I am admitted to practice before all courts in the State of California.

2. On October 17, 1994 the jury in the above-captioned matter was read and given written jury instructions by the Honorable Carlos Bea. A certified copy of Jury Instruction No. 23 which was submitted to the jury is attached to this Declaration as Exhibit A.

3. The jury was specifically instructed by Judge Bea, both orally when he read the jury instructions and by way of the attached Exhibit A, that John Lawrence was not a supervisor of Avis Rent A Car System, Inc.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct to the best of my knowledge. Executed this 26th day March 1997 in San Francisco, California.

DATED: March 26, 1997 /s/ JoAnne Dellaverson
JoAnne Dellaverson

Exhibit A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
DEPT: 16

OSCAR AGUILAR, ET AL.,
Plaintiffs
VS.
AVIS, INC., ET AL
Defendants

FILED
San Francisco County Superior Court
OCT 28, 1994
ALAN CARLSON, Clerk
By /s/ Andrea Corney,
Deputy Clerk

CASE NO. 948597
JURY INSTRUCTIONS READ TO THE JURY
AND SENT TO THE ROOM

The attached is a set of jury instructions read to the jury and sent to the jury room.

DATED: 10/28/94

/s/ RANI EDWARDS
RANI EDWARDS
Clerk

THE ANNEXED INSTRUMENT IS A
CORRECT EXCERPT COPY OF THE
ORIGINAL
ON FILE IN MY OFFICE.
ATTEST: CERTIFIED
MAR 20 1997
ALAN CARLSON, Clerk
SUPERIOR COURT
By: /s/ Clark R. Banayad
Deputy Clerk

SEAL:
Superior Court
City & County of San Francisco Cal.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

OSCAR AGUILAR, et al.,
Plaintiffs,
vs.
AVIS RENT A CAR SYSTEMS, INC., et al.,
Defendants

CASE NO. 948597

JURY INSTRUCTIONS

TRIAL DATE: August 1, 1994

SEAL:
Superior Court
City & County of San Francisco Cal.

Submitted to the jury OCT 17, 1994
/s/ Carlos Bea
Judge of the Superior Court

JURY INSTRUCTION NO. 23

SUBJECT: SUPERVISOR - DEFINITION

The term "supervisor" refers to ta person having the authority, in the interest of her or his employer, to hire, fire, discipline or promote employees or to otherwise significantly affect their employment.

The following individuals are supervisors of Avis Rent A Car System, Inc.

Kathy Klopfer
Mary Gallagher
Davis Sharp
Kathy Black
Gretchen Kuck
Tony Villamil
Owen D'Souza
Katie Matsu

John Lawrence is not a supervisor of Avis.

OCT 14, 1994 /s/ CB, CLK

SEAL:
Superior Court
City & County of San Francisco Cal.

CERTIFICATE OF SERVICE BY MAIL

I, Patti Crowder, declare that I am employed in the City and State of California; that I am over the age of 18 years and not a party to the within action; and that my business address is 225 Bush Street, Fifth Floor, San Francisco, California 94104.

On March 26, 1997, I served the following documents:

NOTICE OF MOTION AND MOTION OF APPELLANTS AVIS RENT A CAR SYSTEM, INC. AND JOHN LAWRENCE TO AUGMENT THE RECORD ON APPEAL; and

DECLARATION OF JOANNE DELLAVERSON IN SUPORT OF MOTION FO APPELLANTS AVIS RENT A CAR SYSTEM, INC., AND JOHN LAWRENCE TO AUGMENT THE RECORD ON APPEAL

on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

Clerk
California Supreme Court
303 Second Street
South Tower, 8th Floor
San Francisco, California
94107-94001
(Original and 10 copies)

Edwin L. Currey, Jr., Esq.
Albert P. Bedecarre, Esq.
Mary B. Halfpenny, Esq.
Adam M. Dodek, Esq.
BRONSON, BRONSON & McKINNON, LLP
505 Montgomery Street
San Francisco, California
94111-2514

LA RAZA CENTRO LEGAL
474 Valencia Street
San Francisco, California
94110

The Honorable Carlos T. Bea
San Francisco Superior Court
633 Folsom Street
San Francisco, California
94107-1385

Clerk,
California Appellate Court
First Appellate District
Division Four
303 Second Street, South Tower
San Francisco, California
94107
(One Copy)

I am familiar with the business practices of Curiale Dellaverson Hirschfeld Kelly & Kraemer, LLP. in respect to the collection and processing of correspondence, pleadings and notices for mailing with the United States Postal Service.

The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of Curiale Dellaverson Hirschfeld Kelly & Kraemer, LLP., so that it will be picked up this date with postage thereon fully prepaid at San Francisco, California, in the ordinary course of such business.

I declare under penalty of perjury that the foregoing is true and correct, and that I have been employed by an office of a member of the bar of this Court at whose direction the service was made.

Executed this 26th day of March, 1997, at San Francisco, California.

/s/ PATTI CROWDER
PATTI CROWDER

APPENDIX F

LEVEL 1 - 12 OF 33 DOCUMENTS

UNITED STATES CODE SERVICE
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CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENTS
AMENDMENT 1

USCS Const. Amend. 1 (1999)

THE CASE NOTES SEGMENTS OF THIS DOCUMENT HAS BEEN SPLIT INTO 2 DOCUMENTS.
THIS IS PART 2.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

1ST SECTION of Level 1 printed in Full format.

DEERING'S CALIFORNIA CODES ANNOTATED
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***THIS SECTION IS CURRENT THRU THE 1999
SUPPLEMENT (1998 SESSION)

INCLUDING URGENCY LEGISLATION THROUGH 1999
REG. SESS. CH. 400, 9/15/99
AND 1999
EXTRA. SESS. CH. 5X, 4/12/99

GOVERNMENT CODE
TITLE 2. Government of the State of California
DIVISION 3. Executive Department
PART 2.8. Department of Fair Employment and Housing
CHAPTER 6. Discrimination Prohibited
ARTICLE 1. Unlawful Practices, Generally

Cal Gov Code § 12940 (1999)

§ 12940. Unlawful employment practices

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the Unites States or the United States of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(h) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occuring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) This subdivision is declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3)(A) For purpose of this subdivision only, "employer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities.

(B) Notwithstanding subparagraph (A), for purpose of this subdivision, "employer" does not include a religious association or corporation not organized for private profit.

(C) For purpose of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment based on pregnancy, childbirth, or related medical conditions.

(4) For other types of discrimination as enumerated in subdivisions (a), an employer remains as defined in subdivision (d) of section 12926.

(5) Nothing contained in this subdivision shall be construed to apply the definition of employer found in this subdivision to subdivision (a).

(i) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all responsible steps necessary to prevent discrimination and harassment from occurring.

(j) For an employer or other entity covered by this part refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in

terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part §demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.

(k) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

(l) Initial application of this section to discrimination by employers on the basis of mental disability shall be in accordance with the following schedule:

(1) Commencing January 1, 1993, for employers with 25 or more employees, the state, and its municipalities and political subdivisions.

(2) Commencing July 26, 1994, for all other employers specified in paragraph (2) of the subdivision of Section 12926 that defined "employer."

APPENDIX G

JOANNE DELLAVERSON, ESQ. SBN 100567
JOEL P. KELLY, ESQ. SBN 100716
DONNA M. RUTTER, ESQ. SBN 145704
McKENNA & CUNEO
One Market
Steuart Street Tower, 27th Floor
San Francisco, California 94105
(415) 267-4000

Attorneys for Defendants
AVIS RENT A CAR SYSTEM,
INC., MARY GALLAGHER,
KATHIE KLOPFER and JOHN LAWRENCE

ENDORSED
FILED
San Francisco County Superior Court
DEC 12 1994
ALAN M. CARLSON, Clerk
By: DEBORAH GREEN,
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

OSCAR AGUILAR; CARLOS BENAVIDES;
FRANCISCO DIAZ; HERNAN FIGUEROA;
MIGUEL FONSECA; RAMIRO HERNANDEZ;
PABLO ICABALCETA; HUBERT JIMENEZ;
GERMAN LAZAO; PEDRO MOJICA;
ORLANDO PERAZA; OSWALDO
RAMIREZ; MARCOS RECINOS;
CARLOS REYES; FRANCISCO ROSALES;
TOMAS RUBIO; and MARIO SERRANO,
Plaintiffs,
v,
AVIS RENT A CAR SYSTEM, INC;
KATHY BLACK; MARY GALLAGHER;
SUSAN HAGEN; KATHY KLOPFER;
JOHN LAWRENCE; KATIE MATSU;
OWEN de SAUZA; DAVID SHARP;
TONY VILLAMIL; GRETCHEN KUCK;
and DOES 1-20,
Defendants.

CASE NO. 948597
DEFENDANTS' OPPOSITION TO PLAINTIFFS'
APPLICATION FOR INJUNCTIVE RELIEF

DATE: December 15, 1994
TIME: 3:00 P.M.
COURT: Honorable Carlos T. Bea
(Department 16)

I.

INTRODUCTION

Plaintiffs seek to gain from the Court in their Application for Injunctive Relief what they were not able to obtain from a jury after a ten-week jury trial; namely, a finding that the Plaintiffs were subjected to wide-ranging discrimination during their employment at Avis, which still continues to this day. The jury in its verdicts, which are binding on this Court, made clear that it did not belive that Plaintiffs had been subjected to the discrimination they complained of during ten weeks of trial. Accordingly, Plaintiffs' request for broad-ranging injunctive relief is unfounded, improper and should be categorically rejected by this Court.

Plaintiffs, in their Application for Injunctive Relief, seek to impose upon Avis training, posting and management requirements that are not imposed by any law, regulation or judicial decision in this State. As is more fully set forth below, there is no California authority which would support such a broad-ranging makeover of Avis' employment practices. In fact, as this Court is bound by the findings of the jury, such injunctive relief would not only be unsupported by relevant case authority, but is prohibited by it. Apparently, in the six weeks that have elapsed since the verdicts were delivered by the Court, the Plaintiffs have forgotten that they were not able to prove to the satisfaction of a jury that they were subjected to a broad spectrum of discriminatory terms and conditions of employment, retaliation and harassment.

The Special Verdicts make clear that the jury categorically rejected the underlying prongs of Plaintiffs' case; namely, that Kathie Klopfer tolerated — indeed encouraged — a wide host of discriminatory acts by her managers against Plaintiffs, and that all the Plaintiffs were subjected to daily harassment by John Lawrence. The case went to the jury only against Avis, Mary Gallagher, Kathie Klopfer and John Lawrence. The jury found that three Plaintiffs (Aguilar, Figueroa, and Icabalceta) were never harassed or discriminated against by anyone. None of the Plaintiffs proved any harassment or discrimination by Gallagher or Klopfer. Of the four

Plaintiffs who claimed discriminatory and/or retaliatory discharge, all claims were decided in favor of Avis either by non-suit, directed verdict or jury verdict. Seven of the Plaintiffs failed to prove any harassment by Lawrence.[1] In considering Plaintiffs' Application for Injunctive Relief, these factual findings are binding on this Court. Hughes v. Dunlap, 91 Cal. 385 (1891).

In the end, the jury found only that Kathy Black had on one occasion in August 1991 discriminated against the eight [2] Latino employees who were involved in the "Computer Incident" and that three Plaintiffs (Pedro Mojica, Orlando Peraza and Marcos Recinos) were harassed by Lawrence. The jury did not find malice or oppression in any of the conduct and no punitive damages were awarded. Of the three Plaintiffs who were awarded damages for harassment by Lawrence, only **one** of them (Pedro Mojica) is still employed at Avis.[3]

For the reasons that follow, Defendants maintain that Plaintiffs have failed to establish an essential prerequisite for injunctive relief, namely that they are in immediate danger of sustaining injury as result of the Defendant's conduct or that there is some substantial likelihood that it will be repeated. Moreover, as to all but three Plaintiffs who are no longer employed at Avis, the application for broad injunctive relief is moot as they no longer have any legally congizable interest in the outcome of the litigation. The application should be denied.

II.

ARGUMENT

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1 The Court also granted Lawrence's motion for a directed verdict on Figueroa's harassment claim.

2 Notably, despite Fonseca's vigorous protestation to the contrary, the verdict shows that the jury concluded that he was not present during the August 11 incident and that his testimony on this point was false.

3 In arguing that injunctive relief is appropriate because Lawrence has continued in his position as Lead Service Agent, Plaintiffs disingenuously assert that "there have been multiple persons harassed," three of who still work at Avis — Ramirez, Mojica and Serrano." [Plaintiffs' Application of Injunctive Relief at 9:15-16]. Only **one** successful plaintiff against Lawrence is currently employed. The jury specifically found that Ramirez and Serrano were **not** harassed by Lawrence. See Special Verdicts of Ramirez and Serrano.

A. Plaintiffs' Application for Injunctive Relief Should Be Denied Becasue Plaintiffs Have Not Shown Any Substantial Likelihood That Any Unlawful Conduct Will Be Repeated

The application seeks mandatory and prohibitory injunctive relief against Avis and prohibitory relief against Lawrence. The grounds for ordering such relief are well settled under both federal and California law. An injunction lies only to prevent threatened future injury and has no application to wrongs which have been completed. As the Supreme Court stated in United States v. W. T. Grant Co., 345 U.S. 629, 73 S. Ct. 894 (1953), in affirming the lower court's order denying the Plaintiffs' prayer for an injunction to prevent future antitrust violations:

> The purpose of an injunction is to prevent future violations.... The **moving party** must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.

345 U.S. at 633, 73 S. Ct. at 898 [Citation omitted; emphasis added]; United States v. Oregon State Medical Society, 343 U.S. 326, 333, 72 S. Ct. 690, 695 (1952) [plaintiff must show "a real threat of future violation or a contemporary violation of a nature likely to reoccur"]; Goodwind v. Circuit Court of St. Louis County, 555 F. Supp. 658 (E. D. Mo. 1982) [injuction relief denied in Title VII sex discrimination action because position sought by plaintiff had been eliminated and plaintiff offred no evidence that discrimination continuing].

California law is fully in accord. An injunction generally is inappropriate with respect to **completed** wrongs. In that instance, the plaintiff's remedy is an action for damages. Gold v. Los Angeles Democratic League, 49 Cal. App. 3d 365, 372 (1975); Fretz v. Burke, 247 Cal. App.2d 741, 744 (1967). Thus, to authorize the issuance of an injunction, it must appear with reasonable certainty that the wrongful acts will be continued or repeated. Volpicelli v. Jared Sydney Torrance Memorial Hospital, 109 Cal.App.3d 242, 250 9180); Gold, Id, at 372-373.

Under this standard, Plaintiffs are not entitled to any equitable relief. The Special Verdicts plainly show that liability was found

solely with respect to Kathy Black's handling of the "Computer Incident" – **an event which occurred in August 1991, more than three years prior to the trial** – and Lawrence's interactions with three Shuttlers.[4] Although Klopfer bore the brunt of the Plaintiffs' allegations at trial, the jury expressly found that she did not harass or discriminate against any of them. In any event, Klopfer is now the District Manager in Seattle, where she no longer has any responsbility over the San Francisco Airport.

Plaintiffs presented no evidence at trial to show contemporaneous harassment or discrimination by Black or Lawrence, nor is there any basis for the Court to determine that there is an "immediate danger" that such conduct will be repeated in the absence of the relief requested. To the contrary, Pedro Mojica (the **only** employee who obtained an award agianst Lawrence and who is still employed by Avis) testified that since December 1991, he has worked only one day a week with Lawrence. He admitted that Lawrence was not harassing him at the time of trial "since I no longer see him." [Tr. of Sept. 22, 1994 Proceedings, at 22:27 - 23:2]. (Attached hereto as Exhibit A.) Likewise, Kathy Black has not worked at the SFO facility since April 1992, and has had no interaction with any of the Plaintiffs since then.

B. The Jury's Findings Do Not Support The Injunctive Relief Requested

The relief requested in Plaintiffs' Application finds no support in the jury's findings. Plaintiffs' entire Application is predicated upon two notions that were either specifically rejected by the jury or not supported by the evidence. First, Plaintiffs state at page 1 of their Application that "The relief is required because Avis ignored Lawrence's conduct for years in the face of numerous complaints..." The Plaintiffs' contention is this regard was soundly rejected by the jury and this Court is bound by that determination. Plaintiffs go on to say at page 1, lines 14 through 16 that the relief is "further necessary because the procedures presently in effect are inadequate to deter or prevent harassment as required by California law." Yet,

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4 Of course, the Special Verdicts do not themselves describe the factual circumstances underlying the jury's finding of liability as to Black. However, the Court will recall that Plaintiffs offered no other evidence concerning Black at trial, and certainly none that would support findings as to all those very same Plaintiffs who were present during the Computer Incident.

there is not a scintilla of evidence or case law supporting this notion. In fact, Defendants have complied totally with California law as set forth in the Fair Employment and Housing Act and implementing regulations. Evidence was presented at trial through Carole Riley that Avis posts the required FEHA posters, presents management training on the issues of discrimination and harassment and posts a policy specifically prohibiting discrimination and harassment on the basis of national origin. Neither the Fair Employment and Housing Act nor its regulations require employers to do anything other than this. In contrast, the Fair Employment and Housing Act and regulations have very specific rules and regulations regarding an employer's obligations in the area of sexual harassment, specifically setting forth the details of a required sexual harassment policy. See Government Code § 12950. There are obvious reasons for treating sexual harassment different from other forms of harassment due to the ambiguity inherent in dealing with the issue of sexual harassment.[5] There is no such ambiguity in dealing with racial or national origin harassment, and neither the Department of Fair Employment and Housing nor the EEOC have implemented regulations requiring employers to treat national origin and racial harassment in the same way as they do sexual harassment. Plaintiffs have no authority, nor do they cite to any, that would impose upon Avis a requirement that neither of the agencies charged with enforcing the laws on discrimination has seen fit to impose.

Further, Plaintiffs in this petition, try to impose upon Avis yet another requirement not found in any case law, nor supported by the jury's findings, namely that Avis post its policies in Spanish, and require managers to be trained in dealing with persons who do not speak English. Of course, Plaintiffs provide no legal support for this notion as there is none. While Plaintiffs certainly made much throughout the trial about Avis' alleged failure to post such policies and procedures in Spanish, there is no basis for the Court to infer that the absence of complaint policies and procedures in Spanish substantially caused harassment.[6] To the contrary, the thrust of

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5 In several side-bar discussions during the trial, the Court emphatically stated that issues of sexual harassment requirements were not relevant to this case.

6 Additionally, there was no evidence presented at trial that 10% of the Avis workforce is non-English speaking, the triggering factor for the DFEH regulations

(continued...)

much of the Plaintiffs' evidence was not that they did not know how to complain, but they had, in fact, complained. However, the jury expressly **rejected** the Plaintiffs' claims that they were each subjected to rampant and continuous harassment, and that they complained about it. Based on the verdicts, it cannot reasonably be inferred that Avis' postings and complaint procedure were inadequate. On this basis, the application should be denied. Ingram v. Madison Square Garden Center, Inc., 535 F. Supp. 1082, 1094 (S.D.N.Y. 1982) [Black and Hispanic cleaners who wanted referrals from union as laborers not entitled to injunctive relief limiting union's future role in referral where union had ceased to play any role in hiring of laborers].[7]

Finally, it would be anomalous indeed to require Avis to come up with policies and procedures that would treat Latino workers differently and encourage the Latino workers not to learn English. This is the worst kind of social engineering, and should be soundly rejected by this Court.

C. The Application for Injunctive Relief Is Moot As To Those Plaintiffs Who Are No Longer Employed At Avis Or As To Third Parties Who Are Not Before The Court Since They Have No Interest In The Outcome of the Litigation.

Plaintiffs seek injunctive relief in favor of many Plaintiffs who are no longer employed at Avis and even as to third party witnesses who testified on their behalf at trial. [Plaintiffs' Application, at 6:5-9]. The Application is entirely unnecessary and must be denied, since such individuals have no interest in the outcome of this application. As discussed above, a court will not grant injunctive

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(...continued)
regarding the posting of FEHA posters in Spanish.

7 Plaintiffs' authorities, such as Bauman v. Block, 940 F.2d 1211 (9th Cir. 1991), are inapposite. In Bauman, the district court found that the Los Angeles Sheriff's Department had discriminated against a wide class of female applicants through use of use of a Sergeant Examination that had a disparate impact on women. In finding that the plintiffs were entitiled to injunctive relief, **the court specifically noted that the invalid test was still in use at time of the appeal.** Thus, the claim for injunctive relief was not moot. 940 F.2d at 1233. Here, to the contrary, the jury's findings do not support an inference of ongoing discrimination.

relief where it is unnecessary. As to those Plaintiffs who are no longer employed by Avis, obviously there is no possibility of future discrimination or harassment by Defendants. They have been fully compensated for any wrongdoing by Defendants and their claim for equitable relief is now moot. Likewise, no claim is before the Court upon which it may properly fashion relief as to non-parties.

Plaintiffs' urge that such broad remedial authority may be found in Peralta Community College v. FEHC, 52 Cal. 3d 40 (1990), and other cases involving judicial review of administrative decisions of the Fair Employment & Housing Commission. Plaintiffs are incorrect. Plaintiffs offer no authority for their suggestion that this Court can order the relief requested here. Peralta involves only the authority of the Commission to award injunctive relief in an administrative proceeding in which the Commission itself is a party - not whether employees may obtain far-reaching injunctive relief in a private action when they already have been fully compensated by a jury award. These are far different inquiries. The Commission's interests in determining the legality of specific conduct and deterring future violations are quire distinct from the individual employee's interest in a personal remedy. The Commission seeks to vindicate the public interest, not merely to redress the plaintiff's injury. See Harris v. Amoco Products Co., 768 F.2d 669, 692 (5th Cir. 1985), cert. denied, 475 U.S. 1011, 106 S. Ct. 1186 (1986) [plaintiff's settlement of private Title VII action does not moot EEOC's right to intervene because the EEOC "exists to represent the public interest in employment discrimination."].

III.

CONCLUSION

After months of testimony, Plaintiffs' allegations were substantially rejected by the jury. Though Plaintiffs apparently refuse to recognize it, the jury concluded that their charges of widespread, systemic discrimination against Latinos are meritless. Those Plaintiffs who proved their claims already have been awarded the full measure of relief to which they are entitled. There is no basis upon which to believe that harassment or discrimination is likely to occur. Accordingly, Plaintiffs have shown no basis for judicial intervention.

For the foregoing reasons, Defendants request that the application be denied in its entirety and that the Court enter judgment in the forms previously lodged by Defendants.

Dated: December 12, 1994

Respectfully submitted,
McKENNA & CUNEO

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